1967-01-01

International Joint Commission: Annotated Digest of Materials Relating to its Establishment and Development

International Joint Commission

INTERNATIONAL JOINT COMMISSION

ANNOTATED DIGEST

of materials relating to its

ESTABLISHMENT AND DEVELOPMENT

Prepared for the Canadian Section
of the
International Joint Commission,
Ottawa, Canada
1967.

RESTRICTED: For use only by the Canadian Department of External Affairs, the United States Department of State and the International Joint Commission.

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CANADA-UNITED STATES

AN ANNOTATED DIGEST OF MATERIALS RELATING TO THE ESTABLISHMENT AND DEVELOPMENT OF THE INTERNATIONAL JOINT COMMISSION

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INTRODUCTION

My original intention in initiating the work which led to the production of the present Digest was to provide an "annotated bibliography" which would identify and locate all existing documentary material on the origins and development of the IJC. As our investigations progressed, however, it became increasingly evident that the end product could be something more useful and of wider interest.

In the present volume Professor Jordan has provided a reliable, unified source of information which will be valuable to the Commissioners and to the two Governments. Not only should it assist us to better understanding of the origins of the Boundary Waters Treaty of 1909 but, equally important, it should enable us to appreciate better the subsequent development in practice, of the principles upon which the IJC was established.

I know that I speak for the whole Commission when I express my warm appreciation of the lively industry and solid scholarship which Professor Jordan has given to this work.

A.D.P. Heeney,
Chairman, Canadian Section,
International Joint Commission,
July 1, 1967.

AN ANNOTATED DIGEST OF MATERIALS RELATING TO THE ESTABLISHMENT AND DEVELOPMENT OF THE INTERNATIONAL JOINT COMMISSION (CANADA-UNITED STATES)

AUTHOR'S PREFACE

The purpose of this digest is to provide a useful reference volume of all available materials, published and unpublished, of primary and secondary nature which relate to the Boundary Waters Treaty, signed on January 11, 1909 by the United States and Great Britain, and to the International Joint Commission, established in 1912 by Canada and the United States under the terms of the Boundary Waters Treaty.

While essentially a reference volume intended as a guide for researchers wishing to locate specific documents or materials, the work is designed in such a manner that it may be read with interest and ease by the person who does not wish to pursue the digested materials beyond the contents of this volume. With this second purpose in mind, fairly extensive annotation of the materials has been made and the arrangement of the materials is basically chronological.

The volume contains all available Canadian-United States and British materials for the period from 1894 to 1966 which have relevance to the background to negotiation of the Boundary Waters Treaty of 1909, to the complicated and protracted negotiations between 1907 and 1912, to the establishment of the International Joint Commission in 1912 and to the development of and changes in the character, role and functions of the International Joint Commission since that date. The sources include Canadian and United States governmental records (papers of the Governors General, Department of External Affairs files, Department of State files, and Parliamentary and Congressional papers and reports), Canadian and United States public archive holdings of the papers and

correspondence of persons connected with the negotiations of the Treaty and with the Commission, relevant records and files of the Canadian and United States sections of the International Joint Commission and the sizeable number of treatises, periodical articles and theses which relate to the subject.

Because the work deals with the establishment and development of the Commission and not with the substantive work of this organization, reference is made to the cases which have come before the Commission only insofar as these matters have a direct bearing on the nature of the Commission. Likewise, the legal issues which have arisen over the years in interpreting the provisions of the Treaty are considered only to the extent of their relevance. For a full treatment of these subjects the reader is referred to Whiteman, M.M. Digest of International Law Washington, U.S.G.P.O., 1964, vol. 3, pp. 752-871; 978-1002, Vade-Mecum and Jordan, F.J.E. The Changing Role of the International Joint Commission (Canada-United States) (unpublished thesis) University of Michigan, 1964.

The preparation of this volume has been carried out by the Canadian section of the International Joint Commission with the cooperation of the United States section, the Department of State and the Department of External Affairs. Certain of the materials contained in the digest are of a classified nature and consequently are open only to authorized persons. This restriction applies to all documentation of the Department of State subsequent to 1933, that of the Department of External Affairs from 1916, the Mackenzie King Papers subsequent to 1930 and to certain of the papers from the files of the Canadian section.

F.J.E. Jordan,

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Ottawa Canada

August 1966

I BACKGROUND TO THE NEGOTIATION OF THE BOUNDARY WATERS TREATY

A. Establishment of the International Waterways Commission

The genesis of the Boundary Waters Treaty and the International Joint Commission established thereunder is generally attributed to resolutions introduced by the Canadian delegate to the International Irrigation Congresses held at Denver, Colorado and Albuquerque, New Mexico in 1894 and 1895. The resolutions, adopted unanimously by the United States, Mexican and Canadian delegations on both occasions, recommended to the United States "the appointment of an international commission to act in conjunction with the authorities of Mexico and Canada in adjudicating the conflicting rights which have arisen, or may hereafter arise, on streams of an international character."[1]

Formal response by Canada was prompt. The Cabinet in 1896 requested the British Ambassador in Washington to inform the United States Government that it was prepared to cooperate "by appointment of an international commission or otherwise" in the regulation of international streams for irrigation purposes.[2] The United States did not respond until 1902 when it advanced a proposal which went far beyond the cooperation envisaged by the Canadian Government in 1896. By terms of the River and Harbour Act of June 13, 1902

> [t]he President of the United States is hereby requested to invite the government of Great Britain to join in the formation of an international commission to be composed of three members from the United States

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1. Chacko, C.J. The International Joint Commission Between the United States and the Dominion of Canada New York, Columbia University Press, 1932, pp. 71-72; L.J. Burpee, "A Successful Experiment in International Relations", Papers Relating to the Work of the International Joint Commission Ottawa, Graphic Printers, 1929, pp. 27-42.

2. Privy Council Order 3465, Jan. 8, 1896.

> and three who shall represent the interests of the Dominion of Canada, whose duty it shall be to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the River Saint Lawrence to the Atlantic Ocean, also upon the maintenance and regulation of suitable levels, and also upon the effect upon the shores of these waters and the structures thereon, and upon the interests of navigation by reason of the diversion of these waters from or change in their natural flow; and, further, to report upon the necessary measures to regulate such diversion, and to make such recommendations for improvements and regulations as shall best subserve the interests of navigation in the said waters . . . The President, in selecting the three members of said commission who shall represent the United States, is authorized to appoint one officer of the Corps of Engineers of the United States Army, one civil engineer well versed in the hydraulics of the Great Lakes, and one lawyer of experience in questions of international and riparian law, and said commission shall be authorized to employ such persons as it may deem needful in the performance of the duties hereby imposed; and for the purpose of paying the expenses and salaries of said commission, the Secretary of War is authorized to expend from the amounts heretofore appropriated for the Saint Marys river at the falls the sum of twenty thousand dollars, or so much thereof as may be necessary to pay that portion of the expenses of said commission chargeable to the United States. [3]

In July, the Presidential request was transmitted to London[4] and in turn to the Canadian Prime Minister for his views on the proposal.[5] Acceptance by the Canadian Government was prompt

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3. 27 Stat. 826; 32 Stat. 372; Canada, Sessional Paper No. 19a, Compiled Reports of the International Waterways Commission 1905 1913, pp. 3-4; Laurier Papers, 1902, vol. 242. no. 67661.

4. Laurier Papers, 1902-04, vol. 753, no. 215545, Despatch from United States Embassy, London to Marquess of Lansdowne, July 15, 1902.

5. Laurier Papers, 1902-04, vol. 753, no. 215544, Despatch from Downing Street to Laurier, July 30, 1902.

and in the following terms:

> That His Majesty's government accept the invitation to cooperate in the formation of the commission; and that, as the subjects to be dealt with pertain to the regulations of waters adjacent to the international boundary, thereby affecting harbours and navigation, all surveys and investigations necessary to carry out the intent of the commission be made, as far as Canada is concerned, under the Department of the Interior and the Department of Public Works; and also, that the appointment of the three members of the commission representing the interests of Canada be made on the recommendation of the Minister of the Interior and the Minister of Public Works.[6]

Following approval of the Canadian proposal by the British Foreign Office in June and subsequent communication of the acceptance to the United States Government, the three United States members of the International Waterways Commission were appointed on October 2, 1903. They were Colonel O.H. Ernst of the Army Corps of Engineers who became United States chairman, George Clinton, a Buffalo lawyer and Professor Gardner Williams of Ithaca.[7] In December the Canadian Cabinet recommended the appointment of its first commissioner, Dr. W.F. King, chief astronomer of the Department of the Interior.[8] Only after numerous urgings by the Colonial Office during 1904[9] did the Government complete the Canadian section with the

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6. Privy Council Minutes, Apr. 27, 1903; Canada, Sessional Paper No. 19a, Compiled Reports of the International Waterways Commission 1905-1913, p. 21.

7. Confidential Prints, St. John River and International Waterways Commission, vol. 1, p. 4, Note from the Acting Secretary of State to the British Embassy, Washington, Oct. 2, 1903.

8. Privy Council Minute, Dec. 3, 1903.

9. Confidential Prints, St. John River and International Waterways Commission, vol. 1, pp. 8-10, Despatches from the Secretary of State for the Colonies to the Governor General, July 27, Sept. 15 and Oct. 2, 1904.

appointments of J.P. Mabee, a lawyer, and Louis A. Costé, an engineer, in January, 1905. Mabee was named chairman of the Canadian section.[10]

Before the Commission met as a joint international body, a disagreement arose between the Canadian and United States Governments as to the investigative scope of the Commission. The Canadian Government, wishing to have the St. John River dealt with, argued that the Commission's jurisdiction extended to all boundary waters between the two countries.[11] The United States Secretary of State rejected this interpretation of the Act of Congress, insisting that the investigative power of the Commission was limited to waters of the Great Lakes system.[12] Perceiving the deadlock which would occur, the Prime Minister advised the Canadian section that in view of the United States' objections, "it would be of no use to persist in our contention, and the Government, therefore, are of the opinion that the Commissioners had better proceed even in that limited way." He urged the Canadian members, however, to continue to seek agreement on a wider jurisdiction.[13]

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10. Confidential Prints, St. John River and International Waterways Commission, vol. 1, pp. 8-10, Telegram from the Governor General to H.M. Ambassador, Washington, Jan. 9, 1905.

11. Confidential Prints, St. John River and International Waterways Commission, vol. 1, 11-12, Despatch from the Governor General to H.M. Ambassador, Washington, Apr. 4, 1905, enclosing Privy Council Minute of Mar. 25, 1905.

12. Canada, Sessional Paper No. 19a, Compiled Reports of the International Waterways Commission 1905-1913, p. 25, Letter from the Acting Secretary of State to George P. Clinton, Apr. 15, 1905.

13. Laurier Papers, 1905, vol. 368, No. 98211, Letter from Laurier to Thomas Coté, Secretary, Canadian Section, June 5, 1905.

In November 1905, the chairman of the Canadian section was elevated to the Ontario bench and to replace him, the Cabinet recommended the appointment of George C. Gibbons, a lawyer from London, Ontario.[14]

B. Studies and Recommendations of the International Waterways Commission

The International Waterways Commission functioned officially from 1905 to 1913, although some of its work continued until 1919. During this period it dealt with power and navigation interests in the Sault Ste. Marie area, utilization and preservation of Niagara Falls resources, adoption of uniform shipping regulations on the Great Lakes, controlling works on the Lake Erie outlet, diversion of boundary waters in Minnesota, the proposed Chicago Drainage Canal, delimitation of the international boundary on the Great Lakes waterway, suppression of illegal fishing on the Great Lakes, regulation of canal shipping and transmission to the United States of power generated in Canada. Although it gathered a great deal of information on these matters, it did not have much success in having its recommendations implemented.[15]

The major accomplishment of this Commission was its early recognition of the need for the adoption of principles of law to govern the uses of all international waters between Canada and the United States and for the need of an international body endowed with the authority and jurisdiction necessary to study and to regulate the uses of these waters. This conclusion culminated in a series of recommendations to the Canadian and

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14. Confidential Prints, St. John River and International Waterways Commission, vol. 1, p. 15, Privy Council Minute Nov. 21, 1905.

15. Canada, Sessional Paper No. 19a, Compiled Reports of the International Waterways Commission 1905-1913, see various reports submitted to the governments.

United States Governments by the two sections of the Commission during 1906 and 1907, that negotiations be undertaken with a view to accomplishing these objectives.

In its report to the governments on conditions existing at Niagara Falls, May 3, 1906, the Canadian section agreed to the proposed régime for preservation of the Falls only on the condition that any treaty must "establish the principles applicable to all diversions or uses of waters adjacent to the international boundary, and of all streams which flow across the boundary." It recommended the following principles:

1. In all navigable waters the use for navigation purposes is of primary and paramount right. The Great Lakes system on the boundary between the United States and Canada and finding its outlet by the St. Lawrence to the sea should be maintained in its integrity.

2. Permanent or complete diversions of navigable waters or their tributary streams, should only be permitted for domestic purposes and for the use of locks in navigation canals.

3. Diversions can be permitted of a temporary character, where the water is taken and returned back, when such diversions do not interfere in any way with the interests of navigation. In such cases each country is to have a right to diversion in equal quantities.

4. No obstruction or diversion shall be permitted in or upon any navigable water crossing the boundary or in or from streams tributary thereto, which would injuriously affect navigation in either country.

5. Each country shall have the right of diversion for irrigation or extraordinary purposes in equal quantities of the waters of non-navigable streams crossing the international boundary.

6. A permanent joint commission can deal much more satisfactorily with the settlement of all disputes arising as to the application of these principles, and should be appointed.

The United States Commissioners declined to join in these proposals on the ground that the enunciation of principles to govern the making of a general treaty was not within the scope of their functions.[16]

In recommending the denial later that year of the application of the Minnesota Canal and Power Company to divert boundary waters from Rainy River, the United States section joined with the Canadian section in the following observations and recommendations:

> 2. As questions involving the same principles and difficulties, liable to create friction, hostile feeling and reprisals, are liable to arise between the two countries, affecting waters on or crossing the boundary line, the commission would recommend that a treaty be entered into which shall settle the rules and principles upon which all such questions may be peacefully and satisfactorily determined as they arise.
>
> 3. The commission would recommend that any treaty which may be entered into should define the uses to which international waters may be put by either country with the necessity of adjustment in each instance, and would respectfully suggest that such uses should be declared to be:
>
> (a) Use for necessary domestic and sanitary purposes.
> (b) Service of locks used for navigation purposes.
> (c) The right to navigate.
>
> 4. The Commission would also respectfully suggest that the treaty should prohibit the permanent diversion of navigable streams which cross the international boundary or which form a part thereof, except upon adjustment of the rights of all parties concerned by a permanent commission, and with its consent.[17]

In its third report of December 31, 1906, the Canadian section reiterated its recommendations, and the United States

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16. Canada, Sessional Paper No. 19a, Compiled Reports of the International Waterways Commission 1905-1913, p. 340.

17. Canada, Sessional Paper No. 19a, Compiled Reports of the International Waterways Commission 1905-1913, p. 368.

Commissioners urged their government to expand the jurisdiction of the United States section in compliance with the wishes of the Canadian Government.[18]

In their 1907 reports, both sections made their final recommendations to the governments on the subject of a general treaty before the whole matter was transferred to the realm of diplomatic negotiations. The United States section report made a general recommendation for a treaty which enunciated principles. The report of the Canadian section was specific and detailed.

> . . . Your commission thought it expedient to first establish principles governing the use and diversion of boundary waters. Once proper principles have been agreed upon, their application by a permanent board must necessarily lead to uniform course of action, whereas if special matters are dealt with by special commission, all manner of inconsistent conclusions might and likely would be arrived at. Once principles are agreed upon, and consistently applied, neither country will obtain any advantage. The commission by their various reports made suggestions and recommendations, from which the following conclusions were drawn:-
>
> 1. The Great Lakes system, including Lake Michigan and Georgian Bay, should be made a common highway for the purposes of navigation to the people of both countries.
>
> 2. The right of either country with respect to such waters is the right of user only.
>
> 3. The primary right of user is for domestic uses (including necessary sanitary purposes) and the service of locks and navigation canals.
>
> 4. Subject to these uses, the use for navigation shall be paramount to all others.
>
> 5. No diversion of these waters shall be permitted to the injury of navigation interests, save such diversions as are necessary for the preservation of the public health (sanitary purposes and domestic use) and service of locks of navigation canals.

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18. Canada, Sessional Paper, No. 19a, Compiled Reports of the International Waterways Commission 1905-1913, pp. 400-401; 429-430.

6. Where temporary diversions of such waters without injury to the interests of navigation are possible, they would be permitted so that each country, so far as is practicable, shall receive an equal benefit. This principle is applicable to diversions for power purposes in the St. Marys and St. Lawrence Rivers.

7. As to streams which cross the international boundary, no diversion of such streams or their tributaries should be permitted in either country so as to interfere with the natural flow thereof to the injury of private or public rights in the other country; nor should any obstruction be permitted in such streams in one country to the injury of public or private rights in the other.

8. In Niagara River, diversions would not interfere with navigation, but there is a special consideration, the preservation of the scenic beauty of the falls, was brought to play. (sic) It was found, however, possible to divert about double the quantity of water on the Canadian side to that possible on the other side, without material injury to the scenic effect.

9. The Commission have not, for lack of jurisdiction, suggested any principle governing the use, for irrigation purposes, of waters which cross the international boundary, but some principle should be adopted which would have general application. We respectfully submit that all the principles so far adopted by the commission commend themselves as worthy of adoption.

The boundary line between these two countries extends across the continent. For a great distance an imaginary line is drawn through boundary waters; elsewhere numerous streams cross and sometimes recross the international boundary. The increased value of water for power and irrigation purposes has given rise to new questions which must be met and settled in some way.

That can be done effectively by a treaty arrangement between the two countries, as only in that way can joint federal jurisdiction be with certainty asserted. Special commissions, which are the outcome of local disputes, are necessarily partial. The commissioners are advocates. A permanent board removed from local prejudices would apply the principles impartially and should be provided for in any treaty arrangement.[19]

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19. Canada, Sessional Paper No. 19a, Compiled Reports of the International Waterways Commission 1905-1913, pp. 528-529; 628-629.

II NEGOTIATION OF THE BOUNDARY WATERS TREATY OF 1909

A. Canada-United States Relations

At the same time as the International Waterways Commission was making its first recommendations to the governments for adoption of general principles of water uses and establishment of a permanent commission, a move was underway in Washington to provide the basis for a comprehensive settlement of all outstanding differences between Great Britain and the United States in relation to Canada. Most of these problems had remained unresolved when the Joint High Commission adjourned its deliberations in 1898 and, following the Alaska Boundary award in 1903 the prospects for any general negotiations involving Canadian interests seemed dim.

In the spring of 1906, however, the British Ambassador to Washington, Sir Mortimer Durand, and the United States Secretary of State, Elihu Root, held private, exploratory talks on the prospects for negotiations. In April, Lord Grey, the Governor General, urged the Foreign Office to permit Prime Minister Laurier to send to Washington in an official capacity, a Canadian expert to help Durand in his negotiations with Root. "The closer you bring Ottawa and Washington together, the greater the chances of cleaning the slate."[1]

Following the talks between Root and Durand, to which no Canadian official was sent, the Secretary of State submitted to Durand a lengthy memorandum setting forth his views on fifteen matters which he felt might well be negotiated. Many of these were items left over from the Joint High Commission

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1. Callahan, J.M. American Foreign Policy in Canadian Relations New York, Macmillan & Co., 1937, p. 495, Letter from Lord Grey to Lord Elgin (private), Apr. 3, 1906.

talks of 1898, but added were several new ones including one of particular note: "Use and disposition of international waters." Pointing out that several water matters were presently under study by the International Waterways Commission, he felt that the two countries should consider a treaty relating to the use and preservation of Niagara Falls immediately.[2]

Laurier did not reply to Root's proposals until the autumn of 1906, when he said with regard to the item of "Use and Diversion of International Waters":

> This subject is engaging the attention of the International Commission appointed by the two governments. I understand it has made substantial progress in many directions. Its work, however, is not yet completed and it does not seem to me there is anything to do at present but to await their final report.[3]

B. Boundary Waters: Preliminary Communications

Discussions narrowed very quickly to a consideration of boundary waters problems when George Gibbons, chairman of the Canadian section of the Commission, informed the Prime Minister that the time was right for considering a treaty embodying the principles enunciated by the Commission.

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2. Governor General's Papers, No. 192A, vol 1, Memorandum from Root to Durand (private), May 3, 1906; Confidential Prints, International Boundary Waters, vol. 1, pp.1-2; Anderson Papers, box 68, Letter from Roosevelt to Root, May 1, 1906.

3. Governor General's Papers, No. 192A, vol. 1, Letter from Laurier to Lord Grey, Sept. 25, 1906; Confidential Prints, International Boundary Waters, vol. 1, p. 3.

> I think it is very desirable that the Treaty should be entered into while President Roosevelt is in power, and while he has as his advisers such men as Secretary Taft, Root, Bonaparte and Chairman like Burton who is eminently fair and a man of very marked ability.[4]

Laurier agreed to act at once.[5]

Gibbons suggested negotiations on Niagara Falls and in addition, "generally with the use and diversion of International or Boundary waters."[6] Minister of Justice Aylesworth was quickly in touch with Gibbons to put the subject "in train for practical action."[7]

Root sought the advice of his special legal adviser, Chandler P. Anderson, who agreed that negotiations should take place with a view to enunciating certain principles to be applied by a commission but he felt that some of the principles recommended by the Waterways Commission were undesirable and he opposed any suggestion that a commission be given any power to enunciate principles.[8]

C. Appointment of Gibbons and Clinton to Confer

Early in 1907, Gibbons was authorized by the Cabinet to go to Washington to confer on the subject of international waters but the terms of his reference were far more restrictive than he would have wished.

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4. Laurier Papers, 1906, vol. 435, No. 116139-116140, Letter from Gibbons to Laurier, Nov. 28, 1906.
5. Laurier Papers, 1906, vol. 435, No. 116141 , Letter from Laurier to Gibbons, Nov. 30, 1906.
6. Laurier Papers, 1906, vol. 435, No. 116212, Letter from Gibbons to Laurier, Dec. 1, 1906.
7. Gibbons Papers, vol. 5, fol. 2 & 3, Telegram from Aylesworth to Gibbons, Dec. 1, 1906; Letter from Aylesworth to Gibbons, Dec. 26, 1906.
8. Anderson Papers, box 68, Letter from Root to Anderson, Dec. 24, 1906; Letter from Anderson to Root, Dec. 28, 1906.

> In a memorandum dated 5th January, 1907, from the Minister of Justice, stating that the International Waterways Commission has made certain reports to the Minister of Public Works of Canada, and the Secretary of War of the United States, with joint recommendations as to the protection and preservation of Niagara Falls, and as to the desirability of regulating and limiting the uses and diversions of waters adjacent to the boundary line between the United States and Canada and of the waters of streams which cross the said boundary line, and as to the desirability of creating a permanent international board for joint executive action in the enforcement of rules and regulations to govern the uses and diversions aforesaid.
>
> The Minister recommends that Mr. George C. Gibbons, K.C., Chairman of the Canadian section of the Commission, be authorized to go to Washington and confer with the United States Government as to whether arrangements can be made for legislation on the part of the United States reciprocal with similar legislation of Canada, providing so far as each country is concerned for giving legislative effect to these recommendations, and that Mr. Gibbons shall report to Your Excellency's Government the result of such Conference and what arrangements can be made with the Government of the United States for carrying out the said recommendations.[9]

Secretary Root visited Ottawa between January 19 and 23 during which time he and Laurier held discussions on boundary water problems and other matters.[10] In this same period Gibbons protested to the Prime Minister the narrow limits imposed on him by the Privy Council order, urging a treaty as a better basis for negotiations in Washington. Laurier was non-committal. "Your suggestion takes a much wider scope than what we had discussed at our last interview, but I will

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9. Confidential Prints, International Boundary Waters, vol. 1, pp. 3-4, Privy Council Minute, Jan. 14, 1907.

10. Callahan, J.M. American Foreign Policy in Canadian Relations New York, Macmillan & Co., 1937, p. 495.

keep it in mind for action later on, if need be."[11] Taking this statement as approval of his proposal, Gibbons promptly informed the British Embassy of his appointment as "special commissioner to confer with Washington about implementing by Treaty or legislation the recommendations of the Commission" and requested an early interview with the Ambassador or chargé d'affaires.[12]

Gibbons proceeded to Washington in February to hold "informal" discussions with the Secretaries of State and War. Reporting to the Prime Minister on his return, he observed that Secretary Taft agreed to the need for a permanent commission and for established principles to obtain fair play for Canadians "which he quite conceded we would never get from special commissions constituted by local politicians and full of local prejudices." Secretary Root, on the other hand, would deal with each problem "to his own advantage" being a "shrewd American who wants all he can get without being particular about the manner of getting." Never doubting that he would continue to negotiate for the Canadian Government, he informed Laurier that he (Gibbons) would arrange for another joint conference through the new British Ambassador.

> It is evident that we are going to have trouble coming to any effective conclusion with these people; it may be accomplished by a persistent effort.
>
> My own idea, growing stronger every day, is that there is only one way in which we will get fair play, and avoid a conflict with them, and that is by a permanent joint commission which will play the game fairly, and whose conclusions will be so justified by public opinion, even in the United States, as to compel their acceptance.[13]

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11. Gibbons Papers, 1907-13, vol. 3, fol. 5, Letter from Laurier to Gibbons, Jan. 24, 1907.

12. Gibbons Papers, vol. 8, Letterbook No. 1, p. 51, Letter from Gibbons to chargé d'affaires Esme Howard (private) Feb. 2, 1907.

13. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 60-63, Letter from Gibbons to Laurier, Feb. 15, 1907; Laurier Papers, 1907, vol. 448, No. 120079-120082.

In early March, at the Prime Minister's request, Gibbons arranged an appointment in Washington with the new Ambassador James Bryce.[14] He found Bryce "very much alive and keen and with an astonishing knowledge, I think, of Canadian affairs." On his return, he sent to Bryce a position paper, outlining the recommendations of the International Waterways Commission and indicating what he felt the Canadians should strive for in the negotiations. Describing the desirable scope of a new commission, he concluded:

> In fact, it could readily have jurisdiction over all matters referred to it for obtaining information and suggestions. This Board would be advisory as to all new matters, but might act in a judicial capacity in giving effect to agreements entered into by the two countries.[15]

Laurier approved fully the position set out by Gibbons and requested Gibbons to stay in touch with the Minister of Justice during the Prime Minister's absence in London.[16] Gibbons, however, was anxious to speed matters along, and suggested another trip to Washington to confer further with the Ambassador and the State Department.[17]

Ambassador Bryce meantime was meeting with the Secretary of State to discuss further all aspects of Canada-United States relations. Both had in mind a general treaty covering a variety of vexing problems, but questioned the feasibility of such an accomplishment. So did the President. In a personal letter to a British member of Parliament, he expressed his doubts.

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14. Gibbons Papers, vol. 8, Letterbook No. 1, p. 76, Letter from Gibbons to the Secretary, British Embassy, Washington, Mar. 2, 1907.

15. Gibbons Papers, vol. 8, Letterbook No. 1, pp.85-89, Letter from Gibbons to Laurier, Mar. 19, 1907, enclosing copy of Letter from Gibbons to Bryce, Mar. 19, 1907; Laurier Papers, 1907, vol. 456, No. 122629-122633.

16. Laurier Papers, 1907, vol. 456, No. 122634, Letter from Laurier to Gibbons, Mar. 26, 1907.

17. Gibbons Papers, vol. 8, Letterbook No. 1, p. 95, Letter from Gibbons to Laurier (confidential), Mar. 28, 1907.

> Bryce has started out well. Whether we can get a general treaty settling the questions between Canada and the United States, I do not know. I should tremble about laying such a treaty before the Senate.[18]

On the matter of international waters, Bryce reported to Laurier the outcome of his talks with Root.

> I mentioned to him your suggestion regarding the question of international waters -- viz, that the existing Commission should be asked to consider and prepare a scheme for the creation of a permanent international Commission with an enlarged sphere and larger powers. He agreed, and begged that you would endeavour to make this request to the present Commissioners as soon as possible. The matter was becoming urgent, he had already thought it well to stop a plan for diverting the waters of the Milk River so as not to prejudice pending arrangements. He suggested that the Commissioners should be asked by you and by his Government to address themselves forthwith to the matter and that the instructions might be "to consider and report what powers ought to be vested in a Commission for dealing with international waters". He thought it might be desirable to have a new Commission, even if it consisted of the existing Commissioners (who were good men and got on well together), because the present U.S. branch of the Commission was under the War Department, whereas the larger Commission contemplated ought so far as the U.S. was concerned to report to the State Department.[19]

Gibbons meanwhile, impatiently awaiting word from Bryce on the outcome of his talks with the Secretary of State, was vigorously defending the integrity of the International Waterways Commission and holding it out as an example of the new approach to Canada-United States relations. Replying to a caution from the Acting Minister of Public Works concerning a matter presently before the Commission, he said:

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18. Theodore Roosevelt Papers, I-L, vol. 7, Letter from Roosevelt to Arthur Lee (personal), Apr. 8, 1907.

19. Laurier Papers, 1907, vol. 459, No. 123685-123692, Letter from Bryce to Laurier (in London), Apr. 11, 1907.

> Really we have passed the stage when it is necessary to warn us constantly against the avarice of our neighbours; our joint Commission has already solved that difficulty.
>
> It is the first time that you have ever had a body dealing directly with the Americans; you have always got the worst of it because you have always had people conducting the negotiations who were not Canadian, and who did not understand the situation. Our Commission has proved the necessity for a permanent joint commission which would adjust not only Waterways matters but other differences between the two countries. It is the only solution; special commissions are partisan and unsatisfactory. A permanent commission must establish principles which cut both ways but which acted on are fair to each and must learn to play fairly, as ours is doing.[20]

Laurier approved the suggestion of Bryce and Root and requested the Acting Prime Minister to put the matter before Council and to inform Gibbons officially of his appointment as the representative of the Canadian section of the Waterways Commission.[21]

Gibbons met with the Cabinet on May 1 and presented his ideas for a draft treaty with the United States. He rejected the suggestion of the Acting Minister of Public Works that he discuss the draft treaty with engineers, preferring to leave the whole matter to be settled between himself and George Clinton who would presumably represent the United States section.[22] He also protested promptly the joint reference formulated by Bryce "to consider and report what powers might be vested in a Commission for dealing with International waters", favoring the Order in Council which directed him to negotiate with Washington officials "with a view to confirming the principles agreed upon by our joint Commission by a treaty or legislation and to create

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20. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 108-111, Letter from Gibbons to Hon. S. Fisher (personal), Apr. 19, 1907.

21. Laurier Papers, 1907, vol. 459, No. 123694, Letter from Laurier (in London) to Sir Richard Cartwright, Apr.23, 1907; Gibbons Papers, vol. 3, fol. 5, Letter from Laurier (in London) to Gibbons, Apr. 23, 1907.

22. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 114-117, Letter from Gibbons to Hon. S. Fisher (private), May 2, 1907.

a permanent Commission to give effect to these recommendations." Noting that a treaty would be preferable as it would require only Senate confirmation, he requested Sir Richard to ask Root to endow Clinton with the same powers and the two would then proceed to draft a treaty.

> In my opinion your Government could not do greater service to the country than to bring about formation of this Board and nothing would meet with more unanimous commendation of the country irrespective of politics and it might be well to consider in the meantime whether the jurisdiction of a permanent Board if created might not well be extended to matters other than boundary waters.[23]

Root concurred in the proposal of Sir Wilfrid but thought that inasmuch as the present Commission was not empowered under its existing constitution to prepare any such scheme, it would be preferable to name Clinton and Gibbons as negotiators quite independently of their functions as commissioners and let them submit the result of their deliberations to the two governments.[24] He so instructed Clinton, outlining for him the matters which should be discussed.

> In an interview between the British Ambassador and myself yesterday, we agreed to ask you and Mr. Gibbons to meet and discuss and suggest a plan for a Commission to deal generally with the subjects of international waterways as between the United States and Canada following the suggestions contained in the reports already made by the International Waterways Commission.
>
> I judged from my conversation with you some time ago, and also from my conversation with Mr. Gibbons, that you both have pretty well matured ideas on the subject. The scope of the duties of the Commission, the degree of finality which its conclusions are to receive, the extent to which we shall endeavor to lay down the principles upon which it is to act, all require careful consideration. We shall

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23. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 123-125, Letter from Gibbons to Sir Richard Cartwright, May 3, 1907.

24. Gibbons Papers, vol. 14, fol. 1, Despatch from Bryce to the Governor General (confidential), May 17, 1907; Confidential Prints, International Boundary Waters, vol. 1, pp. 6-7.

> also have to determine whether any arrangement resolved upon can better be accomplished by means of a treaty or by concurrent legislation of Canada and the United States; also it is necessary to consider whether additional authority should be conferred upon the existing Waterways Commission either by treaty or legislation, or whether a new and distinct Commission should be created. In that case I should think that, as the members of the present Commission have got on so well with each other and their work has been so satisfactory, it would be desirable to make the personnel of the new Commission the same. The same persons, in that case would continue to act as members of two different Commissions. . . [25]

Accepting the appointment, Clinton thought that a treaty would be superior to reciprocal legislation and suggested that the nature of the proposed commission would be vastly different to that of the Waterways Commission. He also doubted the advisability of having two commissions whose jurisdictions might well overlap. His main concern at the moment however was over the status of himself and Gibbons. He wanted to know if they were negotiators or simply advisers to the governments. In addition, he was "wholly in the dark regarding the general purposes of the treaty and the extent of the jurisdiction you have in view for the proposed commission."[26] Root assured him that the work of Gibbons and Clinton was to be "most informal" and they were not acting in their official capacities.[27]

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25. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/1a, Letter from Root to Clinton, May 17, 1907;

26. Numerial File 1906-10, Department of State, National Archives, vol. 484, 5934/2, Letter from Clinton to Root, May 19, 1907; 5934/3, Letter from Clinton to Root, May 24, 1907.

27. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/2, Letter from Root to Clinton, May 25, 1907.

D. Gibbons-Clinton Negotiations and the Treaty Draft

Maintaining his rapid pace, Gibbons was immediately in touch with Clinton, outlining the major points for discussion (incorporation of principles, creation of a permanent body and endowment of that body with advisory powers on all matters including international waters) and suggesting that Clinton might draft up some treaty clauses for discussion when they met. [28] He followed this up two days later with a "roughly sketched Memo" outlining the treaty as he proposed it.[29] The next day he proposed that the two of them proceed to Washington within a week to hold discussions with the State Department and Bryce.[30] Clinton was more reserved. He proposed that they first meet to discuss the questions and ascertain the views of their respective governments and then proceed to draft a tentative plan in accordance with the conclusions.[31] He felt that their role was confined to providing for a general commission and did not include the authority to draft a treaty of water principles.

> I fear that the ideas contained in your memorandum will, if incorporated into a treaty in the form stated by you, narrow the territorial and subject matter jurisdiction of the Commission too much and will leave very little for the Commission to do.[32]

To Root, Clinton gave a brief indication of his views as to the nature of the proposed Commission.

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28. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 140-141, Letter from Gibbons to Clinton, May 20, 1907.

29. Gibbons Papers, vol. 8, Letterbook No. 1, p. 142, Letter from Gibbons to Clinton, May 22, 1907.

30. Gibbons Papers, vol. 8, Letterbook No. 1, p. 143, Letter from Gibbons to Clinton, May 23, 1907.

31. Gibbons Papers, vol. 5, fol. 4, Letter from Clinton to Gibbons, May 20, 1907.

32. Gibbons Papers, vol. 5, fol. 4, Letter from Clinton to Gibbons, May 24, 1907.

> . . . I would suggest, however, that the nature of the proposed commission will differ greatly from that of the one existing. Originally the International Waterways Commission was created to settle various differences existing and likely to arise on the boundary running through the St. Lawrence system of lakes and rivers. Most of these questions involved difficult hydraulic and other engineering problems. As a consequence the commission was organized principally to care for such problems, legal counsel being added, or, in other words, an engineering commission with legal advisers as integral parts was created. The questions which will come before the proposed commission will involve engineering problems, it is true, but much more frequently, I imagine, questions of international comity and law and the application of principles announced in the reports of the International Waterways Commission and approved by both governments, and a new commission should, I think, have a preponderating legal element.[33]

Following a meeting in Washington among Gibbons, Clinton, Bryce and Root, Bryce wrote to the Canadian Government urging that Clinton and Gibbons complete their negotiations on boundary delineation, fresh water fisheries and enlargement of the International Waterways Commission, all matters at that point being considered for inclusion in the treaty, so that the treaty or treaties could be submitted to the Senate before December.[34]

Clinton indicated on June 15 that he had completed his draft of the treaty but had not yet obtained the approval of Root. He proposed to Gibbons that they provide in the commission for a permanent arbitrator "to give the public more confidence in this Commission."[35] Gibbons' initial

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33. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/2, Letter from Clinton to Root, May 19, 1907.

34. Gibbons Papers, vol. 14, fol. 1, Despatch from Bryce to Lord Grey, June 8, 1907.

35. Gibbons Papers, vol. 5, fol. 4, Letter from Clinton to Gibbons, June 15, 1907.

reaction was not unfavourable, [36] but submitting a copy of his proposed treaty clauses to the Acting Prime Minister ten days later, he objected strongly to a permanent arbitrator to decide between the two sections of the commission when they differed. His objection was that all would then be at the mercy of one man; that the policy should be to force the commission to agree upon conclusions wherever possible; that having a permanent umpire would remove any pressure to reach agreement.

> I have been corresponding and consulting with Mr. Clinton over the matter and while adhering to my own ideas I have been going slowly and not forcing his hand but if you approve of the resolutions as I have drawn them I have no doubt I will be able to persuade him to concur without much if any variation.[37]

Commenting on the proposed treaty clauses submitted by Gibbons, Sir Richard Cartwright raised two objections. He felt that a tribunal to deal with all manner of disputes arising between Canada and the United States would "require to be of a different character than the one proposed" to deal with international waterways, boundaries and fisheries. He also objected to it being required to sit exclusively at Washington. "But it will be to mutual advantage to have a commission to arrange boundaries in any case."[38]

Clinton was becoming impatient awaiting comments on the draft which he had sent to Gibbons and felt that they should finalize their work.[39] Gibbons in response sent to Clinton his proposed draft urging inclusion of all recommendations made by

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36. Gibbons Papers, vol. 8, Letterbook No. 1, p. 154, Letter from Gibbons to Clinton, June 17, 1907.

37. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 170-172, Letter from Gibbons to Cartwright, June 27, 1907.

38. Gibbons Papers, vol. 5, fol. 4, Letter from Cartwright to Gibbons (private), June 29, 1907.

39. Gibbons Papers, vol. 5, fol. 4, Letter from Clinton to Gibbons, July 12, 1907.

the Waterways Commission and rejecting Clinton's proposal for a permanent umpire for the same reasons he had stated to the Minister of Justice.[40]

Two days later Clinton acknowledged Gibbons' draft noting that "[i]n some respects the proposed provisions are much clearer than mine and to that extent, preferable."[41] The same day Gibbons replied to Aylesworth's comments on Gibbons' draft, but not so charitably. Emphasizing the need to include the right of free navigation on Lake Michigan to correspond to the rights which United States' citizens enjoyed in relation to the Canadian St. Lawrence and to give "Canadians a foothold for control over Chicago drainage through the Commission", he rejected the suggestion by the Justice Minister that they proceed by way of legislation since this would not provide for the necessary permanence. He added testily that he would be happy to be relieved of the job if the Government did not approve of his efforts. "Really my dear Aylesworth--if the matter is as casual as your letter would imply my time is too valuable to spend over it."[42]

In mid-August Clinton got off to Gibbons a full analysis of Gibbons' draft clauses. He made the following points:

1. Clinton and Gibbons did not quite agree on the main purpose of the treaty.
2. Gibbons' view seemed to be the enunciation of certain fixed principles as the main object; the constituting of a commission was quite secondary.
3. Clinton's view was that the principles would then become the rigid law of the two countries.

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40. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 183-184, Letter from Gibbons to Clinton, July 13, 1907.

41. Gibbons Papers, vol. 5, fol. 4, Letter from Clinton to Gibbons, July 15, 1907.

42. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 186-188, Letter from Gibbons to Aylesworth, July 15, 1907.

> This leaves no scope for the adjustment of differences by the commission, and will deprive it of all power to adjust the rights and interests of parties concerned, to the particular circumstances which may arise in any case, for the commission will have nothing to do but to apply the fixed rules laid down, without regard to circumstances which may make them inapplicable.

4. Clinton would create a permanent commission having public confidence and the

> . . .power to adjust any differences which may arise as to the diversions or use of boundary waters or waters crossing the boundary, and which will also have the power to pass upon other matters connected with the use of such waters, as well as to relocate the boundary line and chart and monument it.

5. Having accomplished this paramount object of the treaty one could then lay down certain principles "for the guidance of the commission" along the lines suggested by Gibbons, "but not in such form as to tie the hands of the commission."

6. Clinton had no objection to a commission of six men although a permanent arbitrator would be preferable.

> Your draft also cuts off the use of waters for irrigation purposes, and does not provide for adjustment of differences, which will undoubtedly arise in the future, caused by pollution of streams.

Clinton noted that he would have included such jurisdiction and, in addition, would have given the commission jurisdiction over navigable streams of all types and over fisheries. He concluded his analysis by enclosing his revised draft providing for the points of criticism which he had offered and expressing the hope that Gibbons would accept his views as to the paramount and secondary aspects of the treaty so that "the Commission will have some discretion and not be limited to ascertaining in particular cases what treaty rule applies."[43]

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43. Gibbons Papers, vol. 5, fol. 4, Letter from Clinton to Gibbons, August 14, 1907.

On August 17, the British Ambassador informed his Government that a draft treaty had been completed.[44] Indeed, Gibbons and Clinton were near agreement. Gibbons found Clinton's proposals acceptable in the main, urging only the addition of a final clause providing for the commission to deal with other questions -- a provision he felt to be essential.[45] Clinton was prepared to concede this point and on September 24 and 25, they signed and submitted to Root and Laurier copies of the draft treaty.

Submitting the draft treaty to the Prime Minister, Gibbons jubilantly announced that he had succeeded in

> . . . getting matters along the line of my original draft without the surrender of any material point. In fact, I think you will agree that the matter is altogether satisfactory.
>
> . . .
>
> If it can [get through the Senate] it will be the best thing that ever happened to this country and, in my opinion, it is the only way of preventing friction between ourselves and the Mother Country as well as between Great Britain and the United States.
>
> Once Americans come to deal directly with us they will play the game fairly. It is only because we have got John Bull along that they bully us. Once get him out of the game and there will be no prestige in tackling

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44. Governor General's Papers, No. 268, vol. 3, Despatch from Bryce to Sir Edward Grey, Aug. 17, 1907; Confidential Prints, International Boundary Waters, vol. 1, p. 10.

45. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 207-209, Letters from Gibbons to Clinton, Aug 30 & Sept. 3, 1907; vol. 5, fol. 4, Letter from Clinton to Gibbons, Sept. 12, 1907. NOTE: There is some confusion in the Canadian archive records as to the identity of the draft treaty that was submitted in September. Evidence in the records suggests that the five-article draft was submitted at this time. However, this does not accord with the American records which point to the seven-article draft. While it seems likely that the latter draft is indeed the one submitted to both governments, texts of both drafts are set out.

a little fellow who will kick their shins. I only pray that Mr. Bryce's view as to the Senate is correct.[46]

Proposed Treaty Clauses

Article I

Whereas the boundary line passes along and through the Great Lakes system;

Whereas use for navigation of the said waters is the common right of both countries and it is desirable to define the principles which should govern such use;

Whereas there are numerous streams crossing the boundary and it is desirable to establish principles governing the use of such waters and tributaries with due regard for the rights of each country;

Whereas the international boundary in parts of the international waters has not been definitely located;

Whereas other questions involving matters of mutual interest are likely to arise and it is desirable to have in existence a joint board to whom such questions can be referred with a view to having the facts ascertained and suggestions made as to proper action to be taken;

Therefore the High Contracting Parties agree:

1. Waters of the Great Lakes system including Lake Michigan and Georgian Bay, the St. Lawrence to the Atlantic Ocean and connecting canals and channels, the Columbia River and all navigable boundary streams are to be equally free for navigation.

2. The paramount use of such waters is navigation and no diversion of boundary waters is permitted save for domestic and sanitary uses and service for locks on navigation canals.

3. Where temporary diversions can be permitted for power purposes of waters passing along the international boundary line without injury to navigation, the same shall be authorized so as to insure each country one half of the surplus available for that purpose.

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46. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 222-225, Letter from Gibbons to Laurier, Sept. 24, 1907; Laurier Papers, vol. 480, No. 129636-129649.

4. In navigable transboundary streams, navigation is paramount, subject to domestic and sanitary needs. No diversion of such waters or streams tributary thereto shall be permitted to the injury of the natural right of user in the other country and no obstruction shall be permitted to the natural flow in one country which would have the effect of inflicting injury upon public or private rights in the other.

5. With the view to the preservation of the scenic beauty of Niagara Falls, diversion above the Falls is limited to 18,500 cubic feet per second for the United States and 36,000 cubic feet per second for Canada.

Article II

The High Contracting Parties agree to appoint a Commission of three members each.

The Commission shall meet early in Washington to subscribe an oath of impartiality and to act according to justice and equity in all matters laid before it by the Government of the United States and Canada.

The Commission may adopt rules of procedure in accordance with justice and equity.

The Commission shall be empowered to consider and determine all matters governed by the principles agreed upon in clauses one to five inclusive of Article I which may be referred to it by either of the High Contracting Parties and of the Dominion of Canada to enforce the findings of the Commission in these regards.

The Commission is empowered to adopt rules and regulations to govern the use and navigation of international boundary waters and it shall also exercise such police powers as may be confided to it by concurrent legislation of Congress and the Parliament of Canada.

A majority of the Commissioners is empowered to render a decision but when a majority cannot agree, the Commission is obliged to endeavour to select an arbitrator to whom disputed matters may be referred for a final decision. Where no agreement is reached on the selection of an arbitrator, then joint or separate reports shall be sent to each of the Governments showing the various views of the matter under dispute.

Article III

The Commission is empowered to locate the boundary line through the Great Lakes according to the Treaty of Ghent of 1842 and in accord with the views of the early Commissioners. The decision of the Commission shall be final.

Article IV

The Commission shall be required to consider and report upon all other matters which may be submitted by the High Contracting Parties. Where the Commission is so authorized by concurrent legislation of Congress and the Parliament of Canada, it shall determine matters so submitted, but in the absence of special authority of this nature, its findings and reports are to be advisory and not judicial.

. . .

All costs of the Commission shall be borne equally by the two Governments.

Article V

One year's notice shall be given for termination of the Treaty. [47]

The draft clauses submitted by Clinton to Secretary Root on September 25 were accompanied by the following explanation.

> The preamble [presumably Article I] was intended to set forth in general the subjects over which the Commissioners are to have jurisdiction, but as the desire of the Dominion Government, expressed by Mr. Gibbons, is to have an arbitration commission, competent to consider all questions which may be referred to it, relating to the United States and Canada, I consented to the insertion of the sixth article which gives the Commission power to consider any and all questions which may be referred to it for decision or recommendation. The preamble embraces the subjects which have been brought to the attention of the International Waterways Commission and extends

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47. Gibbons Papers, vol. 14, fol. 3, Proposed Treaty Clauses, Sept. 24, 1907; Laurier Papers, 1907, vol. 480, No. 129636-129644.

the jurisdiction of the treaty commission territorially to all streams upon or crossing the boundary, and their tributaries. This extension of jurisdiction takes in the St. Johns (sic) River, between New Brunswick and Maine, but it was thought best to leave that stream to be excepted afterwards, if necessary.

Careful study has persuaded me that it is impossible to create a commission whose decisions shall be not only conclusive but self-operative in all cases, and I believe that an attempt to do this would involve so much complication in discriminating between cases in which decisions could be made the law of the land and enforced through the courts, and cases where this could not be done, but which would require the intervention of Congress, that it would be unwise to complicate the treaty by making the attempt. Perhaps it would be unwise to have the treaty on its face vest the Commission with too great powers, by special provision. The treaty itself will create the Commission and give it certain jurisdiction to determine international questions, and the power to do this by treaty under the Constitution cannot be successfully controverted; the decisions of the Commission will, therefore, necessarily be the law of the land, so far as they do not contravene acts of Congress, or the rights of individuals as protected by the Constitution. Nevertheless the action of Congress would be necessary from time to time to enable the Commission to perform its duties, and the questions which may come before the Commission may be of such a nature as to require legislation to enforce them. It would seem to me that such a treaty, being an international obligation, can hardly be ignored by Congress, and that legislation necessary to preserve the good faith of the United States, by carrying out decisions of the Commission, will be forthcoming, almost as a matter of course.

I would call your attention to the fact that the provisions of article III, giving the Commission power to exercise such police powers as may be vested in it by concurrent legislation of the United States and the Dominion of Canada, was inserted with a view to overcome the difficulties which may present themselves in the enforcement of rules and regulations international in their character, and to the fact that it illustrates a class of cases in which congressional action will be necessary.

> Article IV is an announcement of principles for the guidance of the Commission, and contains also matters of definition. The principles involved are substantially those adopted by the International Waterways Commission and approved by the War Department.
>
> Subdivisions 5 and 6 of this article require very careful consideration. The irrigation question is difficult to regulate by a fixed rule, and I therefore persuaded Mr. Gibbons to consent that, subject to the right of navigation, the effect of diversion for irrigation should be cared for "equitably" . . . . Subdivision 6 related to pollution and was inserted to take care of cases which are likely to arise in the future when the Northwest becomes more densely populated; perhaps the language is too strong.
>
> Subdivision 7 follows the report of the International Waterways Commission in relation to Niagara Falls . . . .

Dealing with subdivision 9 relating to the limitation on the right of diversion, Clinton suggested that it might specifically be excluded from application in relation to irrigation.

> Article V provides for definitely ascertaining and fixing by monuments and otherwise the boundary line through Lakes Ontario, Erie, St. Clair, and Huron and the connecting waters. . . . Possibly the River St. Mary, Lake Superior, and the St. Lawrence should be included.
>
> You will probably notice that I have made the appointment of the Commissioners rest with the President alone. Possibly there may be objections to this and, if so, the approval of the Senate can be added.
>
> I would also call your attention to the fact that the reports of the Commission are to be made to the Secretary of State and not to the Secretary of War. This seems to me to be necessary because the subjects passed upon by the Commission will be purely international in their character and, if the action of the War Department shall be necessary to carry out the decision or recommendations of the Commission, it would seem that such action would be had without question, if within the power of that Department. In this connection I wish to say that I think, after very careful consideration, that the existence of the treaty Commission necessarily negatives the idea of the continuance of the International Waterways Commission, inasmuch as there would certainly be conflicts of jurisdiction.

. . . Protection of the fisheries was inserted on account of the vexatious questions which are liable to arise upon the Great Lakes . . . . caused by seizures and attempted seizures of our vessels engaged in fishing, upon the charge that they were in Canadian waters. The provision will enable us to settle such questions, and to provide means for ascertaining whether a vessel which has been seized, was within Canadian waters, without vexatious and expensive litigation and without arousing bitter feelings.

. . . Perhaps I ought to add that I understand the Dominion Government is extremely anxious, as stated by Mr. Gibbons, to have created a permanent board of arbitration, to which all questions which may arise between Canada and the United States can be submitted for final settlement, exclusive, of course, of purely governmental questions and questions of policy.[48]

To--

The Honorable the Secretary of State
of the United States
and
The Honorable the Prime Minister
of the Dominion of Canada

The undersigned have the honor to most respectfully submit for your consideration the attached draft of a proposed treaty.

Dated September 24, 1907.

(signed) George Clinton.
(signed) Geo. C. Gibbons.

Proposed Treaty Clauses

Article I

Whereas questions have arisen and may hereafter arise involving the use and diversion of the boundary waters

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48. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/6-7, Letter from Clinton to Root, Sept. 25, 1907; Anderson Papers, box 68; Senate Document No. 118, 85th Congress, 2d Session, Legal Aspects of the Use of Systems of International Waters Memorandum of the State Department, Apr. 21, 1958, pp. 10-12 (referred to hereafter as Griffin Memorandum, 1958.)

of the United States and Canada, and in relation to the protection of the fisheries therein, the improvement of navigable channels, the location of the boundary line, the construction of new channels for navigation, the improvement and maintenance of the levels therein, and the protection of the banks and shores of such waters; and whereas it is desirable that the rules of navigation upon navigable waters forming a part of the boundary between the United States and the Dominion of Canada, and the use of signal lights of vessels navigating said waters should be uniform; and whereas the use of said waters for power and other purposes should be regulated by joint rules of the United States and the Dominion of Canada, and such rules must be enforced by joint action of said countries; and whereas it is deemed wise by the high contracting parties, in order to settle all such questions now existing, or which may hereafter arise, and to dispose of all other matters above mentioned, that a permanent international commission be appointed with full powers in the premises; therefore the high contracting parties agree that all such questions and matters as they may arise shall be referred by them to a commission to consist of six commissioners, three to be appointed by the President of the United States, and three by His Britannic Majesty; and the high contracting parties agree to appoint the commissioners as soon after the ratification hereof as may be convenient . . .

Article II

The Commissioners shall meet in Washington at the earliest convenient time after they shall have been named, and shall, before proceeding to do any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment and according to justice and equity, without feeling, favor or affection to their country, upon all such matters as shall be laid before them on the part of the governments of the United States and of His Britannic Majesty, respectively, and such declaration shall be entered on the record of their proceedings.

After having organized the commissioners may meet at such times and places as they may appoint. They shall give all parties interested in matters which come before them, convenient opportunity to be heard, and may take evidence on oath when deemed necessary. They may adopt such rules of procedure as may be in accordance with justice and equity and may make such examinations in person and through agents, or employees, as they may deem advisable.

The majority of the Commission shall have power to render a decision, but in case a majority do not agree, the Commission shall select an arbitrator or arbitrators to whom the matters in difference may be referred and whose decision shall be final.

The Commission may employ secretaries, engineers and other assistants, from time to time as it may deem advisable. The salaries and personal expenses of the Commissioners shall be paid by their respective governments, and all other expenses, including the pay of arbitrators, shall be paid equally by the high contracting parties, who shall make proper provision therefor.

Article III

The Commission shall have power to consider and determine all questions and matters related to the subjects specified in Article I which may be referred to it by the High Contracting Parties.

The decision of the Commission upon any matters submitted to it shall be enforced by the High Contracting Parties; and for the purpose of enforcing any rules and regulations, which may be adopted by the Commission, pursuant to the powers conferred upon it by this treaty, the Commission may exercise such police powers as may be vested in it by concurrent legislation of the United States and Dominion of Canada.

Article IV

It is agreed as follows:--

1. The expression "boundary waters" as used in this treaty includes the following described waters, to wit: Lake Superior, Michigan, Huron including Georgian Bay, St. Clair, Erie, and Ontario; the connecting and tributary waters of said lakes, the river St. Lawrence from its source to the ocean; the Columbia River and all rivers and streams which cross the boundary line between the Dominion of Canada and the United States, and their tributaries.

2. All navigable boundary waters, and all canals and channels connecting the same or aiding in their navigation, now existing or which may hereafter be constructed are and shall be forever free for navigation by the citizens and subjects of both countries, ascending and descending, subject to such just rules

and regulations as either of the High Contracting Parties may, within its own territory, impose, provided that such rules and regulations shall not discriminate between the citizens or subjects of the High Contracting Parties.

3. The right to use said waters for navigation is paramount to all other rights, except that of use for necessary domestic and sanitary purposes and the service of canals for purposes of navigation.

4. Where diversions of water are permitted for the purpose of generating power, upon waters along the line of the international boundary, the interests of navigation must be fully protected, and, as far as possible, the right to use one half of surplus waters available for power purposes shall be preserved to each country, its citizens or subjects.

5. Where diversion for irrigation is permitted the paramount right of navigation must be preserved and the rights of each country affected and of its citizens or subjects must be equitably protected.

6. The said waters must not be polluted in one country to the injury of health or property in the other.

7. No water shall be diverted from the Niagara River or from Lake Erie by way of the Niagara Peninsula in excess of 18,500 cubic feet per second in the United States, and 36,000 cubic feet per second in the Dominion of Canada, except for necessary domestic and sanitary uses, and for service of canals for purposes of navigation.

8. Solely for the purposes of this treaty, the expression "Navigable boundary waters" shall be taken to mean all such boundary waters as are subject to public use for the transportation of property, in accordance with the common law as recognized in the Dominion of Canada and in the United States; and the Commission is authorized and empowered to determine the navigability of streams, as matter of fact, when it becomes necessary to do so in matters referred to it.

9. No diversion or obstruction of boundary waters in, or by, either country, which shall materially interfere with the natural flow thereof, to the injury of the other country, or of its citizens or subjects shall be permitted without the consent of such other country.

10. The words "citizens" and "subjects" as used in this treaty shall be deemed to include individuals, corporations, joint stock companies, associations and partnerships.

Article V

The Commission is hereby empowered and directed to ascertain the boundary line between the United States and the Dominion of Canada through Lakes Ontario, Erie, St. Clair, and Huron, and the waters connecting the same as laid down by the Commissioners appointed under the treaty of Ghent, as nearly as possible, and to delineate the same upon modern charts and to describe it in writing, and, so far as practical, by reference to fixed monuments which the Commission may locate and erect and which shall be so described that they can be readily found.

The Commission shall by report, signed by the Commissioners, designate the boundary line so ascertained by it and shall cause to be prepared proper maps delineating the same . . .

The boundary line as ascertained and reported by the Commission shall be the boundary line between the United States of America and the Dominion of Canada, through the waters last above mentioned.

In case a majority of the Commission shall not be able to agree on the location of the boundary line through the waters last above mentioned, in whole or in any part, they shall make joint or several reports in duplicate, to the government of His Britannic Majesty and to that of the United States, stating in detail the points on which they differ.

Article VI

And whereas it is desirable that the said Commission, when formed, should have authority to deal with all other matters, which shall, by consent of both the contracting parties, be submitted to it for decision or which shall with such consent, be referred to it with a view to having the said Commission consider and report thereon with such recommendations as they may think advisable.

Now therefore the High Contracting Parties agree that the said Commission shall, as to all matters so referred to them for decision, have the same powers as are given them with respect to the subjects mentioned in Article I of this treaty.

As to such matters as are not referred to them for decision the said commission shall consider and report upon the facts, with such recommendations as they may see fit.

In case a majority of the Commission cannot, in matters so referred to them for decision, agree upon findings, they shall appoint one or more arbitrators as provided for in Article I, but as to all other subjects referred to them if the majority cannot agree upon conclusions, the views of the members shall be embodied in separate reports to be submitted to both High Contracting Parties.

Article VII

The Commission with all its powers conferred and duties imposed by this treaty shall continue during the pleasure of

> both of the high contracting parties; but if either of the parties desires to terminate this treaty it shall give to the other at least one year's notice in writing before doing so. For all the purposes of these articles the Dominion of Canada shall be deemed to represent His Britannic Majesty.
>
> All reports and communications of the Commission are to be made to the Secretary of State of the United States and to the Prime Minister of the Dominion of Canada.[49]

The Prime Minister passed the draft treaty on to the Minister of Justice for comment[50] and replied to Gibbons that "[a]t first glance it seems to me a very happy solution of a very dangerous subject." He did, however, have doubts about allowing the commission jurisdiction over the whole of the St. Lawrence.[51] To this Gibbons replied that it was necessary to be consistent with the freedom of navigation clause in article twenty-six of the Treaty of Washington.[52]

In the United States, Secretary Root referred the draft clauses directly to Chandler Anderson for his criticisms and comments.[53]

From September to December Gibbons held discussions with Aylesworth and Laurier and corresponded with Clinton. As a result of these discussions and correspondence several changes were agreed upon by the negotiators.[54] On December 3

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49. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/6-7, Proposed Treaty Clauses, submitted by Clinton to Root, Sept. 25, 1907; Anderson Papers, box 68; Griffin Memorandum, 1958, pp. 12-15; Gibbons Papers, vol. 14, fol. 3.

50. Laurier Papers, 1907, vol. 480, No. 129647, Letter from Laurier to Aylesworth, Sept. 26, 1907.

51. Laurier Papers, 1907, vol. 480, No. 129645, Letter from Laurier to Gibbons, Sept. 26, 1907; Gibbons Papers, vol. 5, fol. 5.

52. Laurier Papers, 1907, vol. 480, No. 129650, Letter from Gibbons to Laurier, Sept. 27, 1907; Gibbons Papers, vol. 8, Letter-book No. 1, pp. 228-229.

53. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/6-7, Letter from Assistant Secretary Bacon to Anderson, Oct. 15, 1907; Anderson Papers, box 68.

54. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 265-268, Letters from Gibbons to Clinton, Nov. 26 & 28, 1907; vol. 5, fol. 4, Letter from Clinton to Gibbons, Nov. 29, 1907; vol. 8, Letter book No. 1, pp. 271-272, Letter from Gibbons to Bryce, Dec 2,1907.

and 4, Gibbons and Clinton submitted to the Prime Minister and the Secretary of State a "new draft", Gibbons announcing that he was off to Washington immediately to confer with Bryce and speed acceptance of the treaty by the United States. The new clauses contained the following changes from those submitted in September.

Article III

> The Commission shall have power to consider and determine all questions and matters related to the subjects specified in Article I or in relation to the navigation of the River St. Lawrence from the forty-fifth parallel of north latitude where it ceases to form the boundary between the countries, and of the Rivers Yukon, Porcupine, and Stikine from, to and into the sea, which may be referred to it by the high contracting parties.

Article IV

> 1. The expression "boundary waters" as used in this Treaty includes the following described waters, to wit: Lake Superior, Michigan, Huron including Georgian Bay, St. Clair, Erie and Ontario; the connecting and tributary waters of said lakes, the River St. Lawrence from its source to the forty-fifth parallel of north latitude; the Columbia River and all rivers and streams which cross the boundary line between the Dominion of Canada and the United States, and their tributaries.
>
> . . .

Article IV

> 7. No water shall be diverted from the Niagara River above the Falls of Niagara or from Lake Erie by way of the Niagara Peninsula in excess of 18,500 cubic feet per second in the United States, and 36,000 cubic feet per second in the Dominion of Canada, except for necessary domestic and sanitary uses, and for service of canals for purposes of navigation.[55]

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55. Laurier Papers, 1907, vol. 495, No. 133653-133660, Proposed Treaty Clauses, Dec. 4, 1907; vol. 493, No. 133290-133291, Letter from Gibbons to Laurier, Dec. 4, 1907; Confidential Prints, International Boundary Waters, vol. 1, pp. 15-18; Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/10, Letter from Clinton to Root, Dec. 3, 1907; Anderson Papers, box 68.

Just before Gibbons' arrival in Washington on December 10, the British Ambassador requested from the Canadian Government its views on including delimitation of the boundary line through the Great Lakes in the treaty on boundary waters as opposed to providing for delimitation by a separate treaty and commission.[56] The Prime Minister answered this query and others in an urgent letter which he dispatched to Gibbons in Washington on December 9. He informed Gibbons that it was imperative that the treaty include a settlement of the St. Mary River irrigation question and provide for all other rivers flowing across the boundary. With regard to boundary delimitation on the Great Lakes, he felt that Article V should provide for the matter to be determined finally by arbitration if necessary, rather than having mere separate reports in case of a disagreement.[57]

E. Rejection of the Gibbons-Clinton Draft

Following consultations between Bryce and Gibbons in Washington, the Ambassador on December 13 met with Root to seek favourable consideration by his Government of the proposed treaty. He advanced a number of arguments favouring the single treaty which had been drafted by Gibbons and Clinton.

> Article 4 of the draft Treaty on boundaries received recently from the United States Government and submitted to the Dominion Government provides for the delimitation by the two geographers of the section of frontier through the great lakes and their connecting waterways. The delimitation of that section is already provided for in the draft Treaty on International Waters. It would seem that there would be greater advantages in providing for the delimitation of those waters under the Treaty regulating boundary waters rather than under the general

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56. Confidential Prints, International Boundary Waters, vol. 1, p. 11, Despatch from Bryce to Lord Grey, Dec. 4, 1907.

57. Laurier Papers, 1907, vol. 493, No. 133292-133293, Letter from Laurier to Gibbons, Dec. 9, 1907; Gibbons Papers, vol. 3, fol. 5

> Treaty on Boundaries, and this is the view of Mr. Clinton also, as the Commission executing the former Treaty will have special expert facilities for delimitation and will probably be able to effect the work in conjunction with their other duties without additional expense or loss of time. Moreover, it is in this section that differences of opinion as to the location of the boundary are most likely to occur, and it is in the interests of all that such differences, involving as they will areas of local rather than national importance should be expeditiously and economically adjusted. Article 5 of the draft Treaty on Boundary Waters provides for the settlement of differences by a majority of the Commissioners which gives a better possibility of agreement being attained in that Commission which consists of six members than in the Commission of two provided by the Treaty on boundaries. Moreover, under Article 2, paragraph 3, of the draft Treaty on Boundary Waters the Commission may in cases of difference appoint an arbitrator and although it does not seem to have been contemplated in the draft Treaty that this procedure should be applicable to differences as to the delimitation work effected under Article 5 it may deserve to be considered whether its application to the delimitation might not be convenient.
>
> Further, the powers of the Waterways Commission, as proposed in the draft scheme would render unnecessary the Treaty proposed in the State Department's note No. 88 of June 16 last providing for the appointment of a Commission charged with the distribution of the water supply of the St. Mary's (sic) and Milk Rivers. This work would fall appropriately and conveniently to the permanent Commission established by the scheme under consideration.[58]

The same day, the Ambassador reported the outcome of his meeting with Root to his Government. He outlined his own favourable arguments and those which Root had advanced in opposition to the proposed treaty.

1. Mr. Root favoured geographers to deal with all questions relating to boundary delimitation and did not feel such matters should be subjected to arbitration.

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58. Governor General's Papers, No. 268, vol. 3, Despatch from Bryce to Sir Edward Grey, Dec. 13, 1907; Confidential Prints, International Boundary Waters, vol. 1, pp. 14-15, International Waterways Pro Memoria from Bryce to Root, Dec. 13, 1907; Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/20.

2. Mr. Root felt that the irrigation questions in relation to the St. Mary and Milk Rivers should be dealt with by a special commission.

> . . . He observed that the real difficulty in all these frontier questions lay in the fact that at some places private persons had already begun to plan and execute works in their own interest which they would not like to see exposed to prohibition or alteration on the part of a Commission armed with wide powers; and that this alarm might lead them to stir up their senators or representatives to oppose the Treaty.

3. With regard to the St. John River, "Mr. Root thought it would be safer, in order to avert possibly dangerous opposition in the Senate that this river should also be omitted from the scope of the Commission on Boundary Waters."

4. Mr. Root favoured the recommendations of the International Waterways Commission in relation to Niagara Falls but felt that this matter might have to be dealt with in connection with the Chicago diversion.

> It appeared to me that Mr. Root feared that American opinion might think that the Commission would have powers rather too wide; especially as the addition of the arbitration clause would practically exclude governmental action on matters within its scope; and though I believe he personally would not object to their having these powers, he may believe that his countrymen are hardly yet prepared for so bold a step. He seemed indeed to be not over sanguine of getting through a scheme of such importance, which, he observed, appeared to have considerably outgrown its original intentions. I replied that no doubt it was desirable to exercise foresight as to possible opposition, and consider how far it could be avoided by any concession or exception on any particular point which did not prejudice the main object.
>
> He undertook to read carefully the draft Treaty, on which he had only just before received a report. . .[59]

The Ambassador expressed much the same view in a letter to Sir Wilfrid on the next day.

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59. Governor General's Papers, No. 268, vol. 3, Despatch from Bryce to Sir Edward Grey, Dec. 13, 1907; Confidential Prints, International Boundary Waters, vol. 1, pp. 12-14.

> . . . He[Root] is evidently apprehensive of opposition from local people who will fear a large strong Commission and seems to think it would be easier to deal with the matters likely to raise controversy by referring them to Special Commissions.[60]

The report to which Root referred in his conversation with Bryce was one prepared for the Secretary by Chandler Anderson as a result of the request made in October when the draft treaty was referred to Anderson.[61] A report in extenso was submitted to Root on December 9.

> BOUNDARY WATERS
>
> Report on the Draft Treaty Relating to International Boundary Waters Proposed by George Clinton and George C. Gibbons, Members on the Part Respectively of the United States and Canada, of the International Waterways Commission
>
> (Sets out a summary of the major features of the proposed treaty: creation of a six-man commission; matters within the jurisdiction of the Commission; powers of the Commission, procedure of the Commission; principles of law to be applied by the Commission; referential scope of the Commission.)
>
> . . . .
>
> The extent of the jurisdiction proposed to be conferred upon this international Commission is in some ways without precedent. Its functions, as appears from the foregoing summary of the treaty provisions, are twofold -- judicial and administrative -- and several unusual features are presented with respect to each.
>
> Taking up first for consideration the judicial functions to be exercised by this Commission, it will be found that they show a notable departure from the course heretofore followed by this Government in delegating by treaty judicial powers to an international commission. In such treaties it has been customary to limit the exercise of the judicial powers of such a commission to some particular question already at issue and involving matters not wholly within the jurisdiction of either of the parties to the treaty, or over which neither of the parties alone had undisputed control. This treaty,

60. Laurier Papers, 1907, vol. 493, No. 133276-133281, Letter from Bryce to Laurier (confidential), Dec. 14, 1907.

61. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/6-7, Letter from Bacon to Anderson, Oct. 15, 1907; Griffin Memorandum, 1958, p. 15.

however, instead of following such precedents proposes to confer upon this Commission complete judicial powers over questions both present and future and involving matters which in some respects at least are wholly within undisputed governmental control on one side or the other of the boundary. Among the matters within the group referred to are the following:

The use and diversion of waters tributary to boundary waters and waters crossing the boundary, such waters under the definition in the treaty being included among the "boundary waters" over which the Commission has jurisdiction.

The improvement of navigable channels and the construction of new channels in "boundary waters."

Protection of banks and shores of "boundary waters."

It will be observed that so far as these matters are embraced wholly within the territory of either the United States or Canada or relate to waters not actually contiguous to the boundary line, or to waters flowing from one country into the other across the boundary, international law is not directly concerned with them. The question at once arises, therefore, as to what principles or system of law will be applied by the Commission in determining questions involving these matters.

No particular mode of procedure for referring questions to the Commission for decision is provided in the treaty, but presumably questions are to be referred by joint action of the executive branch of each Government, and not by a supplementary treaty, and the extent of the judicial functions intended to be conferred upon the Commission must, therefore, be measured by the terms of this treaty.

. . . .

(Sets out the major criticisms of the principles to guide the Commissioners in dealing with boundary and transboundary waters, finding the principles raise far more questions than what they settle.)

. . . Apart from any questions as to the advisability of adopting these principles as presented, which will be considered later, it is evident that even if these were adopted, they would not furnish adequate guidance for the decision of the questions which may arise involving the use of waters tributary to boundary waters or of streams crossing the boundary.

It follows from these considerations that, as the treaty now stands, it fails to establish any principles or system of laws controlling these several matters, and consequently that with respect to them the Commissioners are left free to adopt their own ideas of justice and equity in the decision of questions arising thereon, which practically amounts to a power to legislate.

It is not likely that the approval of the Senate would be given to a treaty delegating to an international commission such unrestricted powers over matters wholly within the borders of the United States, and it is doubtful if any amendment to the treaty could be devised which would overcome the difficulty presented. Where, as in this case, international law fails to apply, it is necessary, if the questions are to be submitted to an arbitration tribunal, to establish by mutual agreement some other principles or rules of law which will control. The possibility of this, however, is out of the question with respect to a commission which is to exercise judicial functions for a period of years over questions to arise in the future involving such matters as these, and particularly such an undeveloped subject as the use of tributary waters or waters crossing the boundary. It would be a practical impossibility to formulate a series of principles or rules adequate to cover all questions which might arise in these matters except, perhaps, with reference to the improvement and construction of channels and the protection of shores and banks; and, even if it were possible to accomplish this with respect to all or any of these matters, there is no assurance that an agreement thereon could be reached between the two Governments.

The difficulty might perhaps be met by providing for a supplemental treaty to cover each case referred to the Commission, in which the questions submitted could be precisely stated, and some guiding principles could be adopted to control the decision. If, however, it is necessary to do this in every instance, it might quite as well be done independently of the present treaty, and in that case there seems to be no particular reason for including such matters within its scope.

Taking everything into consideration the only satisfactory solution of the difficulty seems to be to eliminate from the scope of this treaty all those matters which lie wholly within the control of the respective Governments on their own side of the boundary line.

. . . .

(Sets out five disadvantages to the United States which would occur as a result of relinquishing to an international commission matters where "international law recognizes that the right of either country to exercise full control over such matters, so far as they are within the territory of that country, does not depend upon the consent of the adjoining country." United States would lose the right of exclusive control over diversions from Lake Michigan and the Milk and St. Mary Rivers. United States would have to obtain Canada's consent before dealing with its own tributary waters. United States has more to gain from diplomatic bargaining in relation to the St. Mary and Milk Rivers. The United States Government would be hampered in the channel improvements which it undertakes in boundary waters. Bank and shore protection works by the United States would become subject to approval by the Canadian Government.)

. . . .

The judicial functions to be conferred upon this Commission extend to only two other classes of matters in addition to those above discussed. These are as follows:

(1) The use and diversion of boundary waters, which in this connection include only such waters as may properly be regarded as contiguous to the boundary in distinction from those classed above as tributary thereto.

(2) Such other matters as may be referred by mutual consent to the Commission for decision, or report and recommendations.

The jurisdiction proposed to be conferred over the second of these two classes of matters involves questions entirely outside of the present discussion, as they are not limited to the uses of international waters, and the principles adopted by the treaty do not apply to them. For the purposes of this discussion, it is sufficient to note therefore, that if it is not intended that a special treaty shall be entered into whenever any such matters are submitted to this Commission for decision, it is hardly likely that the Senate would consent to that feature of the present treaty, and if such special treaties are to be entered into, this provision is surplusage. So far, however, as this provision gives the Commission jurisdiction merely to report with recommendations on questions submitted to it, there probably would be no objection to permitting such submission to be made by the executive branch of the Government, if the questions to be submitted were limited to the particular subjects covered by the treaty.

The proposed delegation of jurisdiction over the first of the two above-mentioned classes of matters presents somewhat different considerations from those heretofore discussed. Here no particular difficulties arise as to the propriety and effectiveness of the treaty provisions from a legal standpoint and the chief questions involved are the expediency of delegating to this Commission the proposed powers as a matter of governmental policy, and the sufficiency of the treaty provisions for accomplishing the desired results.

The question of governmental policy can profitably be postponed until the other questions here presented are examined.

. . . .

(Sets out the conflicting principles of international law relating to the uses and diversions of boundary waters, noting that none of the principles are firmly established in all respects.)

. . . .

In view, however, of the lack of authority for many of the conclusions above stated, and whether or not they can be relied in, it would seem to be highly desirable for the purposes of this treaty, that, so far as possible, the underlying principles, their application to special cases and the rules applicable to particular conditions and uses which are to control the decision of the commission, should be agreed upon and set out in the treaty irrespective of whether they are regarded as merely declaratory of principles of international law or as modifications or extensions of them.

. . . .

(Deals with the various "principles of guidance" set out in Article IV of the draft treaty. Recommends the exclusion of Lake Michigan from the definition of "Boundary Waters" and the withholding of the right of free navigation of the lake unless something is granted in return. Doubts the validity of the priorities of uses of boundary and transboundary waters provided for in the draft.)

This question of the order of precedence among the various uses of these waters presents many difficulties. Navigation, sanitation, irrigation, power, domestic and canal purposes are the uses referred to, and each in turn has some claims for preference over the others, and the situation is further complicated by the fact that a

paramount use at one point may be unimportant at another. But, notwithstanding these difficulties, it seems to be essential for the purposes of this treaty that the order of precedence to be observed among these uses under the varying conditions found along the course of the boundary should be determined, inasmuch as the exercise of each one of these uses tends to conflict with or restrain some of the others. It is not likely that either Government would be willing to leave the determination of this question to an international commission, and it is, therefore, necessary, if this treaty is to be entered into, for the Governments themselves to come to an agreement on the question and to incorporate such agreement in the treaty. It might be possible to classify the localities along the boundary in accordance with the natural conditions presented and prescribe the order of precedence for the uses of the waters of these localities, or it might be possible to formulate some equation to express the values of the several elements entering into the question, or if no shorter method was feasible the particular uses to be preferred at each point of importance along the boundary might be specified.

In addition to settling the relative importance of these various uses, the question of regulating and limiting the extent of such uses on each side of the boundary must also be provided for.

. . . .

(Discusses clauses 4, 5, 6, 7, 8 and 9 of Article IV regulating diversions, sharing of surplus waters, pollution, use of Niagara Falls, navigable waters and obstruction of boundary waters. Two major criticisms of the provisions. They "leave more to the discretion of the Commission than seems desirable, and regarded as defining the jurisdictional powers of the Commission they seem to conflict with the general scheme of the treaty." Second, by making any major diversion subject to the consent of the other country, the whole question is thrown "back into the field of diplomatic negotiations for special agreements on each case as it arises, with complications which would not exist without this treaty.")

. . . .

Apart from the provisions above reviewed, the treaty proposes no other principles or rules for the guidance of the Commission in deciding questions submitted to it. No reference is made to action on either side resulting

> in the elevation of the normal surface levels of these waters, and the question of the storage of surplus waters is not dealt with at all.

Anderson concluded his analysis and criticism of the draft clauses with three recommendations. He urged elimination from the treaty of all references to regulation of fisheries, demarcation of boundaries, construction and improvement of channels, protection of shores and banks and all matters relating to the use of tributary and transboundary waters, leaving within the jurisdiction of the commission only "uses of contiguous boundary waters." He noted the danger of leaving the principles to the determination of the commission. If the body was to determine all questions relating to boundary waters

> . . . it seems to be essential that the principles to be followed in deciding such questions should not be left to the discretion of the Commission, but, so far as possible, should be agreed upon by the two governments, and incorporated in the treaty, and that such principles should control the order of precedence to be observed among the uses referred to under the varying conditions found along the course of the boundary, and the treatment of exceptional cases and also the extent of such uses to be permitted upon each side of the boundary under both general and particular conditions.

He also suggested that the governments call upon the Waterways Commission to investigate and report on a series of principles for possible adoption.[62]

Before these views were transmitted to the Canadian Government in late January along with Root's proposals for a quite different treaty arrangement, Gibbons was busy in Ottawa impressing on Laurier the need for his Government to remain resolute in the face of the apparent opposition from Washington and insist upon acceptance of the treaty as drafted. In a report

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62. Anderson Papers, box 68, Report on the Draft Treaty . . . Dec. 9, 1907; Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/11-12; Griffin Memorandum, 1958, pp. 15-21.

to the Prime Minister on his December 10 visit to Washington, he was very critical both of the Secretary of State and the British Ambassador. Bryce had not allowed Gibbons to deal personally with Root and had made a very weak case to the Secretary himself. In fact, Bryce was of no assistance at all; rather, he was "an obstruction to obtaining what ought to be insisted upon, a permanent commission." As for Root, he was not convinced of the need for a permanent body and wanted separate special commissions to deal with the irrigation question and with delimitation of boundaries in the Great Lakes.

> . . . Mr. Root pretended to yield but he is evidently going back again to his natural inclinations. He is a keen, aggressive and not over scrupulous American and Mr. Bryce is about as unsuitable, in my opinion, as any one that can be suggested to combat him.
>
> I think your attitude now should be one of firm insistence upon a permanent Board to deal with all these matters and, moreover, I think it absolutely essential that somebody equal to the occasion should deal with Mr. Root.[63]

This outburst was followed up shortly with a request that Sir Wilfrid instruct Bryce to allow Gibbons to deal directly with the Secretary of State, feeling certain that he was the 'somebody equal to the occasion' of convincing the Secretary of the desirability of the proposed agreement.

> The matter will fiddle along month after month, if left to the British Ambassador, and I very much doubt even then of his being able to accomplish anything.[64]

The Prime Minister acted, although not as positively as Gibbons would have wished. In a letter to Bryce he rejected the United States' argument for three separate treaties, insisting that first and foremost, there must be a single commission created, designed to apply similar principles in all cases.

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63. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 285-290, Letter from Gibbons to Laurier (personal), Dec. 16, 1907; Laurier Papers, 1907, vol. 495, No. 133821-133826.

64. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 295-297, Letter from Gibbons to Laurier, Dec. 21, 1907; Laurier Papers, 1907, vol. 496, No. 134102-134104.

> . . . It is of the greatest importance that the same rules should apply to the regulation of all such waters and that these rules should be under the jurisdiction of the same Commission, as question after question will arise.
>
> I will again communicate with the Chairman of our section, Mr. Gibbons, and ask him to go again to Washington. I would hope that by your joint efforts you will be able to come to a speedy conclusion with Mr. Root. Gibbons is active and energetic; he is familiar with all aspects of the question and his thorough knowledge of all local conditions ought to be of great assistance to you to meet objections and to drive matters to a prompt and definite issue.[65]

Early in the new year, Bryce met again (in the absence of Gibbons who had not been invited down to Washington on this occasion) with the Secretary of State. Root, having now read Anderson's report on the draft clauses, rejected outright the proposed treaty in virtually all respects. Bryce reported the meeting to the British Foreign Secretary.

> . . . He[Root] . . . was confirmed in the view he had previously expressed to me that the draft in its present form went too far and could not be recommended by his Government to the Senate. It handed over to a permanent commission which would be independent of the two Governments a large and unascertained number of questions, many of them still unexplored, many perhaps of high importance, affecting the economic and industrial interests of large areas and of populations which might some day be large. Not enough was known of these issues to warrant so bold a step, the consequences of which in particular cases could not be predicted. He added that it was not the Anglo-Saxon habit to deal in an abstract fashion with principles before the cases they were intended to cover had arisen and been examined; and that he doubted for instance the wisdom of such a provision as that contained in the draft treaty that navigation was always to be the first interest considered. In particular instances irrigation or the use of water for generating power might be more important. So he did not wish to see a declaration that the use of water was always to be exactly equal as between the two countries. In taking of water from the Niagara River, for power purposes, this principle had been departed from. I represented strongly to him that the very fact that the effect in

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65. Laurier Papers, 1907, vol. 493, No. 133282-133289, Letter from Laurier to Bryce, Dec. 24, 1907; Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons (private) Dec. 26, 1907, enclosing copy of letter to Bryce.

concrete cases of the general principles which a commission might lay down and then proceed to apply, could not be ascertained beforehand had at least this advantage, that it would enable any disputes to be settled with more evident impartiality, and that we might safely assume that over so long a boundary line there would be no substantial gain to either country, as against the other in the application of the same principles to a large number of cases . . . Admitting that some of the matters to be left to the Commission might turn out to be of magnitude, still on the whole the balance of advantage was in favour of letting this be adjusted by the Commission . . . To keep them in the hands of the two Governments would be to leave grounds of controversy which, when pressed by persons locally interested, might hereafter prove embarrassing to the Governments and a source of angry feeling among the inhabitants of the border regions of both countries. Mr. Root, however . . . adhered to the view that the issues likely to arise were too grave for the Governments to renounce control over . . . He clinched the matter by observing that at any rate the Senate would think so, and that he entertained no hope of inducing that body to pass the Draft Treaty in its present form. This is a result which I had fully expected and heartily as I share Sir Wilfrid's views, I cannot but recognize that the difficulties which the attitude of the Senate presents are insuperable.

When I suggested to Mr. Root that to bring the matter into a practical shape he should submit the alterations in the Draft Treaty which he desires, he undertook to do so and let me have the draft on an early day . . .

I have mentioned in another despatch of even date that Mr. Root on being pressed to agree to Sir Wilfrid's suggestion that the delimitation of the International Boundary through the Great Lakes should be entrusted to the International Waterways Commission, agreed that this should be done.[66]

66, Confidential Prints, International Boundary Waters, vol. 1, pp. 18-20, Despatch from Bryce to Lord Grey, Jan. 5, 1908, enclosing copy of Despatch from Bryce to Sir Edward Grey, Jan. 4, 1908; Laurier Papers, 1908, vol. 755, No. 216108-216112, Despatch from Lord Elgin to Lord Grey, Feb. 8, 1908. Note: separate treaties relating to Inland Fisheries and to the Delimitation of Boundaries were signed April 11, 1908, thus removing these matters from the draft treaty. The International Waterways Commission was given jurisdiction to delineate the boundary through the Great Lakes.

In knowledge of Bryce's failure to convince Root of the importance of accepting the Gibbons-Clinton draft treaty, Gibbons felt it imperative to go to Washington and again urged Laurier to insist that Bryce allow Gibbons to deal directly with Root.

> Personally, I have not the slightest ambition in this matter, but if we are to make headway, Canadians have to meet Americans directly and not through the intervention of Englishmen, however capable in a scholarly way.[67]

To which the Prime Minister replied:

> I feel pretty certain that you have only to ask Bryce to allow you to discuss all these questions with Root and that he will be only too glad to give you the opportunity.[68]

In response to the report from Bryce of Root's intransigence , Laurier merely replied to the Governor General that "[t]he only thing for Mr. Bryce to do is to insist upon the treaty as drafted and that no departure from it can be accepted."[69] At the same time he instructed Gibbons to proceed to Washington, Bryce having informed the Prime Minister that he had now received the new proposals from the Secretary of State.[70] Gibbons agreed, announcing that he was going to be absolutely firm with Root.[71]

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67. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 308-309 Letter from Gibbons to Laurier, Jan. 8, 1908.

68. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons, Jan. 10, 1908.

69. Grey of Howick Papers, vol. 3, 1908, No. 000691, Letter from Laurier to Lord Grey, Jan. 20, 1908.

70. Confidential Prints, International Boundary Waters, vol. 1, p. 28, Telegram from Bryce to Lord Grey, Jan. 30, 1908.

71. Laurier Papers, 1908, vol. 503, No. 135806-135808, Letter from Gibbons to Laurier, Jan. 31, 1908; Gibbons Papers, vol. 8, Letterbook No. 1, pp.319-321; vol. 8, Letterbook No. 1, p. 325, Letter from Gibbons to Bryce, Jan. 31, 1908

F. Root-Anderson Proposal: A Commission of Inquiry

Secretary Root kept his promise to Bryce and had Anderson prepare an alternative draft treaty which, Root proposed, would replace the unacceptable clauses drafted by Clinton and Gibbons. Anderson submitted this draft to Root on January 25 and the Secretary transmitted it to Bryce on January 29, just as Gibbons was about to depart for Washington.[72]

> Draft of Proposed Treaty for the Appointment of a Joint Commission of Inquiry With Respect to Questions Arising Between the United States and Canada Along Their Common Frontier.
>
> The United States of America and His Majesty Edward the Seventh of the United Kingdom . . . being equally desirous that provision may be made for an impartial and expert examination under their joint direction, whenever desired on either side, with respect to questions or matters of difference affecting the mutual relations of the United States and the Dominion of Canada and arising along their common frontier, with a view to securing harmonious and mutually acceptable action on both sides in dealing with such questions or matter, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed their respective plenipotentiaries as follows:
>
> . . . .
>
> Article I
>
> A Joint Commission of Inquiry, composed of six Commissioners, three on the part of the United States and three on the part of Great Britain, shall be referred from time to time for examination and report any questions or matters of difference arising between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along their common frontier, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

72. Numerical File 1906-10 Department of State, National Archives, 5934/18a, Letter from Root to Bryce, Jan. 29, 1908; Anderson Papers, box 68.

The Joint Commission of Inquiry hereby constituted is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate if called for, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

The reports of the Commission shall not be regarded as decisions of the questions or matters submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

Article II

The three Commissioners on the part of the United States shall be appointed by the President of the United States, by and with the advice and consent of the Senate . . .

The three Commissioners on the part of Great Britain shall be appointed by _____. . .

It is the desire of the High Contracting Parties that, so far as may be convenient, one of the commissioners appointed on each side shall be a lawyer of experience in questions of international and riparian law, and one an engineer well versed in the hydraulics of the Great Lakes.

. . . .

Article III

The Commission shall hold the first meeting and organize at such time and place as may be required by the reference to it of any questions or matters for examination and report, as above provided, and when organized the Commission may fix the times and places for its meetings, subject to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment, shall, before proceeding with the work of the Commission, make and subscribe an oath or declaration in writing that he will carefully and impartially examine and report upon all questions and matters referred to the Commission . . .

Article IV

The Commission may employ secretaries, engineers, and other assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commissioners shall be paid by their respective Governments, and all other expenses shall be paid in equal moities by the High Contracting Parties.

Article V

The Commission shall give all parties interested in questions and matters which come before it convenient opportunity to be heard, and may take evidence on oath when deemed necessary. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

Article VI

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports, each to his own Government.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

Article VII

All reports and communications of the Commission shall be made to the Secretary of State of the United States and to the (?) Prime Minister of the Dominion of Canada.

Article VIII

This treaty shall remain in force for _____ years after its date and thereafter until terminated by a twelve months' written notice, given by either High Contracting Party to the other.[73]

In transmitting the Anderson draft treaty to London and Ottawa, the British Ambassador reported the essence of his discussions with Root on the matter. This meeting, too, took place in the absence of Gibbons.

> In a conversation which I had with the Secretary of State several days ago he informed me that the Draft Treaty which he had sent me . . . was meant to replace the Draft Treaty prepared by Messrs. Gibbons and Clinton . . . . He had . . . concluded that it was better to prepare an

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73. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/18a, Draft of Proposed Treaty . . .; Anderson Papers, box 68; Griffin Memorandum, 1958, pp. 21-22; Governor General's Papers, No. 268, vol. 4, Despatch from Bryce to Sir Edward Grey, Feb. 3, 1908; Confidential Prints, International Boundary Waters, vol. 1, pp. 30-32, Despatch from Bryce to Lord Grey, Feb. 3, 1908.

entirely new draft embodying his views of how such a treaty should be drawn and what it might effect. This new treaty need not, he said, interfere with the existing International Waterways Commission and it might be thought desirable to appoint as Commissioners under it the same persons who were now serving on the existing Commission. The same persons might quite well act in different capacities under the Statute of Congress which created the existing Commission and under such a treaty as he now proposed. I represented strongly to him, following the same line of argument as was reported in my previous despatch, the superior merits of Messrs. Gibbons and Clinton's Draft Treaty, pointing out that it would be far better that all questions of boundary waters should be left to one strong and impartial permanent Commission whether for arbitration in the manner indicated in the Gibbons-Clinton draft, or for a friendly adjustment in a give-and-take spirit, having regard to local circumstances. He adhered, however, to his previous views maintaining that the questions contemplated in the Gibbons-Clinton draft were, or at any rate sometimes might be too large to be left to any commission. The two Governments must deal with them directly by negotiation, and this for two reasons: lst, they raised important questions of policy and involved interests too large for a commission to deal with; 2nd, their settlement involved a formulation of principles to govern matters whose bearing and significance were still unexplored. General principles could not be laid down until the whole subject had been thoroughly investigated.

While expressing to him the dissent of the Dominion Government to his view and the deep regret I should feel if our discussions should not result in the adoption of the best means of relieving the two Governments of a long series of difficult and probably controversial questions by leaving them to a commission which might be so constituted as to inspire general confidence in both countries, I observed that even on his own view of the case it would be proper that a clause should be added to his draft enabling both Governments to refer to the Commission any emerging questions which might require to be arbitrated on or to be adjusted in a friendly way. Even if he thought it impossible to secure the passage of such a treaty as the Gibbons-Clinton Draft, a Commission might at any rate be utilized for further and larger purposes than those of reporting whenever the two Governments thought fit. After some discussion he agreed to this suggestion and asked me to draft such a clause as would effect the object I suggested. This I undertook to do

> without prejudice however to the general question at issue between us, as I felt sure that the Dominion Government would continue to prefer the scheme outlined in the Gibbons-Clinton Draft to that which he now put forward. Referring to Article 6 of his Draft, I suggested that if two sections of the commission sent different reports to the two Governments, it would be proper that each section should see the report prepared by the other, though there would of course be nothing to prevent either section from communicating privately with either Government. He was disposed to accept this suggestion. I have asked Mr. Gibbons to come from Canada to join me in discussing this matter further with the United States Government and hope to see him shortly here.
>
> In conclusion, I may say that although Mr. Root appeared to me to speak from personal conviction in pressing the arguments which he stated to me, the real and ultimate difficulty may be found to lie not so much with him as with the opinion in certain quarters and sections of the United States, and particularly with the United States Senate . . . [74]

Gibbons arrived in Washington in early February armed with explicit instructions from the Prime Minister that the St. Mary and Milk Rivers problem must be provided for in the general treaty and not separately.[75] At the same moment, Lord Grey received from the British Ambassador a note urging Canadian action on approval of the Delimitation of Boundaries and St. Mary and Milk Rivers draft treaties which had been prepared by Anderson and Root earlier and forwarded to Canada. Root could not appreciate the Canadian argument that the irrigation question must await conclusion of the wider treaty. [76]

Gibbons was successful in this visit to Washington, not only in meeting with Root personally, but also, as became

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74. Confidential Prints, International Boundary Waters, vol. 1, pp. 29-30, Despatch from Bryce to Sir Edward Grey and Lord Grey, Feb. 3, 1908; Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/78-80; Griffin Memorandum, 1958, pp. 22-23.

75. Laurier Papers, 1908, vol. 503, No. 135927, Letter from Laurier to Gibbons, Feb. 4, 1908.

76. Grey of Howick Papers, vol. 8, 1907-08, No. 002143-002144, Despatch from Bryce to Lord Grey, Feb. 7, 1908.

apparent later, in convincing the Secretary of the need for a more comprehensive scheme than that embodied in the Root-Anderson draft treaty. His report to the Prime Minister was enthusiastic and reflected his determination. He had taken a firm stand against the Commission of Inquiry proposed by Root, although he conceded that with the inclusion of an arbitration clause as proposed by Bryce it would be substantially improved. But he continued to urge the absolute necessity for principles to be applied by the commission. On the second day of meetings, Root acquiesced to the need for enunciated principles and a permanent board to enforce them, but he doubted that such a treaty would pass the Senate. Gibbons persisted, pointing out that if the Senate would not accept a limitation on the right to divert waters, then they could provide for a principle of the right to divert--as long as there was a principle enunciated and uniformly applied.

> In a 3000 mile boundary the application would cut both ways, but what we did not want and could not stand for was that one principle should be applied to their advantage through pressure of their politicians in one place, and another principle to equal advantage in another.

He insisted, too, that any treaty must include rights of navigation on Lake Michigan, provisions for Niagara diversions and settlement of the irrigation problem on the prairies.

> Of one thing you may be sure now. Mr. Root thoroughly understands our view of the matter and respects us for standing up for our rights. You can understand, even when thoroughly convinced that it is their policy to be honest and decent with us, that it is not so easy, even then, to get through a treaty on that line. There seems to be no control at Washington on the part of the Executive over the action of Congress.

Finally, Gibbons informed Laurier that he had asked Bryce to come up to Ottawa shortly to discuss with the Prime Minister and himself whether to accept "what is offered by Root or to press for everything."[77]

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77. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 329-330, 336-341, Letters from Gibbons to Laurier, Feb. 10 & 11, 1908; Laurier Papers, 1908, vol. 504, No. 136170-136171, 136214-136219.

While Gibbons was hoping for a rejection of the proposed Commission of Inquiry and reinstatement of his own scheme, Bryce was seeking to salvage as much as possible of the amended Root-Anderson draft treaty. He submitted to Laurier the proposed arbitration clause which he and Gibbons had drafted as an amendment to the United States draft treaty.

> . . . Mr. Root expressed himself convinced of the impossibility of obtaining the consent of the Senate to the clause as originally framed. He considered that amendment underlined in red ink, as essential to the passage of the treaty. In face of this conviction it seemed that insistence by me on the original clause would merely cause unnecessary delay and I therefore agreed to refer it to the Dominion Government.
>
> Although the amendment undoubtedly detracts from the practical value of this addition by us to Mr. Root's draft, yet, even as amended, the extension by it of the Commission's power under the clause is considerable; and as I do not consider that such an extension would at any future date have been possible with a similar provision for control by the Senate, the amendment does not, in my opinion, prejudice the future development of the Commission's functions and powers . . .
>
> Draft Clause for Approval
>
> 1. If at any time it shall appear to the High Contracting Parties that any questions or matters affecting the interests of the United States and of Canada can with advantage be referred for determination to the Commission as hereby constituted, the High Contracting Parties may, by common consent and on the part of the United States with the advice and consent of the Senate, so refer such matter; and the majority of the Commissioners shall have power to determine the same, and their decision thereon shall be final and binding on both the High Contracting Parties. In case the Commission shall be equally divided the Commissioners shall appoint one or more arbitrators by whom, or the majority of whom, an ultimate decision shall be given which shall be final and binding.[78]

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78. Laurier Papers, 1908, vol. 504, No. 136220-136222, Despatch from Bryce to Lord Grey, Feb. 11, 1908; Confidential Prints International Boundary Waters, vol. 1, p. 33.

In a personal letter to the Governor General, Bryce expressed his misgivings for the intransigence of Gibbons and Laurier with regard to Root's compromise offer. He suggested that if Canada insisted in holding out for Gibbons' original proposals, it would end up with nothing, for Root had gone as far as he felt he could.[79] He did not, however, succeed in shaking the Canadians from their position. He returned from his visit to Ottawa with the following memorandum summarizing his conversations with Sir Wilfrid.

> 1. International Waterways Commission. Draft submitted by Mr. Root not acceptable. Draft prepared by Gibbons and Clinton should be basis of any treaty.
>
> 2. Draft Treaty Regarding Niagara River. Dominion Government thinks this subject should be dealt with along with other boundary waters.[80]

Presumably proceeding on the assumption that the two governments were deadlocked on the matter of a general treaty, the Secretary of State called the British Ambassador in on February 15 to express his disappointment at having received no reply from the Canadian Government regarding the draft treaty dealing with the division of the waters of the St. Mary and Milk Rivers which he had submitted in June of 1907 and to present the Ambassador with a memorandum for the basis of a treaty relating to the diversion of waters from the Niagara River above the Falls. The memorandum proposed a twenty-five year treaty limiting the quantities of water which each country might divert for power purposes above the Falls and providing for a re-examination of the limitations after ten years by a special commission or by "such standing commission as shall then exist for the purpose of considering, deciding or reporting upon questions relating to the boundary waters between the United States and Canada.[81] In transmitting these messages to

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79. Grey of Howick Papers, vol. 8, 1907-08, No. 002154, Letter from Bryce to Lord Grey (personal), Feb. 14, 1908.

80. Laurier Papers, 1908, vol. 504, No. 136223, Summary of Memorandum prepared by Mr. Bryce, Feb. 23, 1908, of his conversation with Sir Wilfrid Laurier during his visit to Ottawa.

81. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/13-17, Letter from Anderson to Root, Jan. 30, 1908; Anderson Papers, box 68, Note from Root to Bryce, Feb. 15, 1908.

the Governor General and the Foreign Office, Bryce pointed out that he had argued with Root once again for inclusion of these matters in a general treaty establishing a single commission but that Root had remained adamant in his opposition to such a scheme.[82]

Bryce continued hopeful that some compromise could be reached on these various matters and requested Gibbons to come to Washington immediately "to clean things up and if possible secure fair arrangement."[83] It appeared that the Government of Canada might be prepared to deal with the matters piecemeal when the Cabinet in early March proposed that the two governments appoint representatives to confer on the matter of working out an equitable apportionment of the irrigation waters on the prairies. It noted, however, that it was still of the view that this matter with all others would best be dealt by a single commission operating under general principles, "but as there is no prospect of immediate adoption or even consideration of the views set forth in [the reports of the International Waterways Commission]", it had agreed to deal with the urgent irrigation questions separately.[84] The Canadian Government appointed Dr. W.F. King and the United States Government appointed Mr. Newell to confer on this question.[85]

The Canadian Government quickly followed up its agreement on the irrigation question, with an outright rejection of Root's proposal for a Commission of Inquiry. Recapitulating the recommendations made by the Waterways Commission and the proposals contained in the Gibbons-Clinton draft treaty, the Cabinet concluded:

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82. Confidential Prints, International Boundary Waters, vol. 1, pp. 34-37, Despatches from Bryce to Sir Edward Grey and to Lord Grey (with enclosures), Feb. 15 & 16, 1908.

83. Gibbons Papers, vol. 6, fol. 2, Telegram from Bryce to Gibbons, Feb. 24, 1908.

84. Confidential Prints, International Boundary Waters, vol. 1, pp. 38-40, Despatch from Lord Grey to Bryce, Mar. 6, 1908.

85. Confidential Prints, International Boundary Waters, vol. 1, pp. 44-45, Despatch from Lord Grey to Bryce, Apr. 8, 1908; Telegram from Bryce to Lord Grey, Apr. 11, 1908.

> The Committee of the Privy Council are of the opinion that if any progress is to be made, it is imperative that some action be now taken to adopt these or other principles. The present Commission can only advise, not adjudicate, and some finality must be reached in dealing with the subjects of reference. Your Excellency's advisers are disposed to approve of the provisions of the draft treaty recited above. They would be satisfied with any convention which may be agreed upon along the general lines of this suggested draft, but they feel that to substitute for it the proposal to create an advisory board, though with more extensive jurisdiction, would not be a satisfactory solution of existing difficulties.
>
> The Committee are most desirous to avoid the irritation which they apprehend will arise if special cases are to be considered without established principles, as controlling rules of action. Possibly, if the conclusions suggested by the Commission are not satisfactory to Mr. Root, others might be suggested by him which would be acceptable to Your Excellency's Government.[86]

Transmitting the message to Root, Bryce added his own plea for cooperation.

> Having during my recent visit to Ottawa discussed this subject at some length with the Governor General and his Ministers, I have become impressed with the earnestness of their wish to secure some means of dealing upon certain settled and definite principles with the questions regarding waters now pending and likely hereafter to arise. In their view the best way of precluding any controversial bitterness in the future is now at once, before vested interests in the use of waters have become numerous or important, to determine such principles, the application of which impartially between the two countries will be accepted as fair and equitable by both, and powerfully contribute to the maintenance of those friendly feelings between the inhabitants of the frontier districts which, I need not assure you, they heartily desire to preserve.[87]

Root acknowledged without comment the note from Bryce setting out the Canadian position and the same day, sent the note along

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86. Governor General's Papers, No. 268, vol. 4, Privy Council Minute, March 18, 1908; Gibbons Papers, vol. 14, fol. 1, Despatch from Lord Grey to Bryce, Mar. 18, 1908; Confidential Prints, International Boundary Waters, vol. 1, pp. 40-43.

87. Numerical File 1906-10, Department of State, National Archives,vol. 484, 5934/19, Note from Bryce to Root, Mar. 23, 1908; Anderson Papers, box 68; Griffin Memorandum, 1958, pp. 23-25.

to Anderson for his observations.[88]

Following the signing in April of the Fresh Water Fisheries and Delimitation of Boundaries treaties, Bryce and Gibbons approached Root once again in early May urging that all remaining questions relative to boundary waters now be dealt with "in some comprehensive way, not by piece-meal negotiations or a series of special commissions." Bryce proposed that, assuming it was impossible to provide for a commission with powers of decision, at least they might agree upon enunciated principles of water use to guide the two governments. Root did not feel that even this was feasible. He did agree to give the matter further consideration. Bryce was not encouraged.

> Strongly as I personally feel the desirability of securing such a Treaty as that drafted by Messrs. Gibbons and Clinton, and cordially as I agree with the ideas which have inspired the policy of Your Excellency's Government, I entertain little hope that the United States Government can be induced to adopt those ideas. The most that these present negotiations seem likely to secure will fall short of that Treaty. For even if Mr. Root himself could be induced to assent to it, his conviction that he could not get it accepted by the Senate would prevent him from courting failure by submitting it to that suspicious body, in which the selfish interests of the frontier States, acting upon their Senators, would be sufficient to determine the action of the whole body.[89]

The Canadian Government was not to be dissuaded from its position which it reiterated for the benefit of the Ambassador and the Secretary of State.

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88. Numerical File 1906-10, Department of State, National Archives vol. 484, 5934/19, Note from Root to Bryce, Mar. 28, 1908; Letter from Root to Anderson, Mar. 28, 1908; Anderson Papers, box 68.

89. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons May 6, 1908; Laurier Papers, 1908, vol. 756, No. 216170-216172, Despatch from Bryce to Lord Grey (confidential), May 8, 1908; Governor General's Papers, No. 268, vol. 4; Confidential Prints, International Boundary Waters, vol. 1, pp. 45-46.

> The Committee beg to observe that if no principles are laid down in advance and if each particular case is to be considered as it may arise, it seems obvious that local interests, which may be different in different localities, must of necessity produce friction, often very difficult to allay. The Waterways Commission was created for the very purpose of avoiding such friction. After giving much thought and reflection and considerable research to the question, they made a report in which they have affirmed clear principles, and proposed the creation of a special commission by which every case, as it arises, may be settled on the principles thus laid down.
>
> The Committee still believe that the immediate adoption of this report is daily growing of more importance and they express the conviction that Mr. Bryce should again make representations to the Secretary of State in this direction.[90]

On June 1, the British Ambassador transmitted the Canadian view to the Secretary of State and the same week he met with Root to clarify the positions of the two governments.[91] At the meeting Root handed Bryce a lengthy note drafted by Anderson setting out the United States position which remained essentially as before. The only new suggestion was that all matters dealt with in the reports of the International Waterways Commission could likely be dealt with as problems arose, under the general arbitration treaty which had just been concluded between the United States and Great Britain. Root elaborated his opposition to the Clinton-Gibbons proposals.

> The difficulty of the United States in assenting to an agreement that all questions within the broad field described by the Gibbons-Clinton draft shall be referred for final determination to such a Commission as is proposed, is in the main that such questions necessarily involve, not merely questions of fact and law suitable for the determination of a Commission or Arbitral Tribunal, but many questions of

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90. Governor General's Papers, No. 268, vol. 4, Privy Council Minute 2103, May 28, 1908; Confidential Prints, International Boundary Waters, vol. 1, pp. 47-48, Despatch from Lord Grey to Bryce, (confidential), May 30, 1908.

91. Numerical File 1906-10, Department of State, National Archives vol. 484, 5934/25, Note from Bryce to Root, June 1, 1908; Anderson Papers, box 68.

> policy, of mutual concessions and of the give and take which is in so great a number of cases the efficient means of reaching possible settlement of difficult controversies. Such questions of policy, of concession, of discretion, it is impossible for the Government of the United States to commit to any Commission.
>
> . . . .
>
> As to the declaration of principles which was incorporated in the Gibbons-Clinton draft and which the Committee of the Privy Council deems it desirable to incorporate in the treaty, I cannot avoid the conclusion that the subject with which we are endeavouring to deal has not yet been sufficiently developed to justify the incorporation of such a declaration in the terms of a solemn treaty. With our meagre knowledge as to what the numerous questions of the future are to be, the conditions under which they may arise and the considerations which should govern their determination, I feel that the data we now have are insufficient to make it safe to endeavor now to lay down hard and fast rules of this description which are to govern the unknown questions of the future . . .

Pointing out by way of example the flaws which he saw in each of the enumerated principles, Root concluded:

> The Department has assiduously endeavored to devise modifications of these rules which would avoid the objections, but the effort has resulted in the conclusion that this could only be done by so limiting the terms of the attempted expressions of general principles as to make them really worthless for any practical purpose. I am convinced that instead of attempting now to codify the rules to be applied to this still partially considered subject, the true method is that which is followed by the courts of both countries, to permit the Commission which is to deal with the various questions as they arise to declare in its decisions from time to time the principles which they deem applicable, and, following the precedents thus established so far as they are applicable to each successive case, to build up a system of rules which will be the result of experience and consideration in concrete cases.[92]

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92. Anderson Papers, box 68, Draft of Proposed Note to British Ambassador, in answer to his of March 23, 1908, (undated); Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/25, Note from Root to Bryce, June 4, 1908; Anderson Papers, box 68; Governor General's Papers, No. 268, vol. 4; Confidential Prints, International Boundary Waters, vol. 1, pp. 51-54; Griffin Memorandum, 1958, pp. 26-29.

Reporting the outcome of this meeting to the Governor General, Bryce did not conceal his discouragement and suggested that perhaps any further discussions should take place directly between Gibbons and the United States Government.

> As Mr. Root and I have now debated this question thoroughly five or six times, and have shot all the arrows out of our respective quivers, I doubt whether more can be obtained by further discussion on the present lines. He is evidently resolved not to accept the Gibbons-Clinton Draft Treaty, conceiving that the Senate would never accept it. The most that can, so far as I can at present judge, be considered as likely to be obtainable from him or them is--
>
> (a) The installation by Treaty of the proposed Commission as a Court of Arbitration for boundary water "questions of a legal nature" . . .
> (b) The recognition by Treaty of the Commission as a body to which disputes relating to boundary water may be referred for inquiry and report.
> (c) The recognition by Treaty of the Commission as a body to which the two Governments may from time to time by special agreement agree to intrust the settlement of disputes, not of a strictly legal nature, which negotiation has failed to settle.
>
> Each of these three points taken separately may seem to be limited in scope and value, but taken together they would have the advantage, in the first place, of excluding reference to those local and special Commission which Your Excellency's Ministers disapprove; and, in the second place of creating a body with functions so wide and so varied that it might, if it consisted of able, weighty and tactful men, acquire great moral authority, and be able to constitute an effective counterpoise to those often selfish and narrow minded local interests whose clamour is apt to embarrass Governments and to impede and frustrate friendly negotiations. It might, indeed, become in time a permanently effective agency for the settlement of this class of disputes such as Your Excellency's Government has desired. In concluding our conversation I asked Mr. Root whether it would, in his opinion, be desirable that Mr. Gibbons, to whose services in these matters recourse has frequently been had, should meet someone connected with the State Department to talk over the subject with the advantage of the special knowledge of the working of the existing Waterways Commission which Mr. Gibbons possesses. Mr. Root agreed and said that he would himself be glad to see Mr. Gibbons on an early day.[93]

93. Laurier Papers, 1908, vol. 756, No. 216192, Despatch from Bryce to Lord Grey, June 8, 1908; Confidential Prints, International Boundary Waters, vol. 1. pp. 48-51; Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/78-80, Griffin Memorandum, 1958, pp. 29-31.

G. Anderson-Gibbons Negotiations

The Prime Minister requested Gibbons to go to Washington directly to confer with Root on this "most delicate matter" and agreed that Gibbons should stay in close touch with the Minister of Justice.[94] Gibbons promised to go as soon as he had prepared a memorandum for Root outlining strongly the Canadian case.[95] Copies of this memorandum he submitted to Laurier, Aylesworth and Lord Grey on June 13, presenting Root with the original on June 18 when he arrived in Washington. The letter accompanying the copy sent to the Governor General indicated his attitude toward the forthcoming negotiations.

> What some Americans desire, including Mr. Root, is to keep matters open in such a way that they can, as usual, deal with each one as it arises so as to obtain an advantage. We are absolutely right in the stand we have taken, and it should be maintained; and if we have the nerve and self-respect to maintain our position, success will follow.[96]

Memoranda for Mr. Root

> [With the signing of the treaties relating to boundaries and fisheries, what is now desired is the appointment of a Joint Commission that shall have power to decide questions as to the use and diversion of boundary waters upon certain definite principles accepted by the two countries.
>
> ....
>
> It is suggested by your memoranda that the subject with which we are endeavouring to deal has not yet been sufficiently developed to justify the incorporation of a declaration of principles in the terms of a solemn treaty. I beg to submit that we have long passed the stage at which there is a shadow of doubt as to what principles should be applied in dealing with the use of the waters of the Great Lakes System. By Treaty arrangement these waters are open to the use of the citizens of each country for the purposes of navigation

94. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons, June 9, 1908.

95. Laurier Papers, 1908, vol. 522, No. 141476-141477, Letter from Gibbons to Laurier, June 13, 1908; Gibbons Papers vol. 8, Letterbook No. 1, pp. 390-391.

96. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 392-393, Letter from Gibbons to Bryce, June 13, 1908.

and neither country has now any right to interfere with the use of these waters to the injury of such interests (save the use for domestic purposes). The failure to recognize this principle would lead to endless confusion. Public opinion, without a dissenting voice, supports it.

....

It is suggested by you that a different principle was adopted in dealing with the question of Niagara, but that is not so. As I explained to you before the interests of navigation would not be affected if all the water in the Niagara River were diverted below the crest of the rapids and returned to the river again below the present falls. There it was a question merely of preserving the scenic effect.

....

It was never contended by us that we were, as a matter of right, entitled to the use of more than one-half of the surplus water of these boundary streams, but it is contended that we are entitled to the use of one-half and that that principle ought to be established.

....

Assume that there may be exceptional cases elsewhere where these rules may be departed from -- is there any reason why they should not be applied to the Great Lakes System and is there any reason why a Joint Board should not be appointed? On the contrary, I submit the adoption of principles would limit the powers of the Joint Board and that they should be limited. The main questions of principle should be settled by the two Governments.

What advantage is there in your suggestion that the Commission be a Board of Arbitration to deal with disputes in lieu of the Hague Tribunal? If they are going to be a Board of Arbitration why not give them power at once to carry out in detail the spirit of an Agreement entered into between the two countries? The suggestion that conditions may change is not a reason why the present conditions should not be met and dealt with.

I do not think there would be the slightest objection to a provision in the Treaty that it could be terminated by either side on giving one year's notice. I am satisfied, however, by my experience in the workings of the Commission that if the course outlined is adopted the Treaty will become permanent and will work out to the great satisfaction of both peoples.

Dealing with the question of streams crossing the international boundary, it does seem to me that the two countries must either accept the principles suggested by the Commission or reject them and leave each country free to do as it sees fit within its own territory with regard to these waters.

The Commission concluded that it should be accepted as a principle of international law, that no diversion of such waters should be permitted in one country to the injury of private or public interests in the other, without the consent of that other; and to the further principle that no obstruction should be permitted in such streams in one country to the injury of public or private interests in the other, without that other's consent. Where such diversions or obstructions were desirable, no doubt such consent could be acquired by obtaining charters in each country which charters could and would doubtless provide for the protection of all interests.

The adoption of the principles suggested will not only be a correct declaration of international law but will do much towards the maintenance of a kindly spirit between the two countries. The questions to be submitted to the Commission would not be, as suggested by you, questions of policy, concession or discretion. Questions of policy would be settled by the terms of the Treaty and the Joint Board would be merely the machinery necessary for its enforcement.

It was certainly not intended by us to give to the Commissioners the discretion to deal between different sets of citizens in the United States but rather, to use your word, to dispose of simple issues of fact according to the law as declared by the terms of the Treaty.

How can a body not having power to decide issues create precedents? When are these precedents to become the law and who is to make them the law? They never could be made law excepting by the decision of some Court having jurisdiction to decide issues. Laws cannot be made by an advisory Board.

With so many States and Provinces having or asserting jurisdiction, is not a Treaty between the two countries, declaring what the law is to be as between them and creating a Board under federal jurisdiction a manifest necessity?

....

> I repeat these matter to you not in any spirit of controversy, which I certainly seek to avoid, but because, after the most careful consideration I can give it, your memoranda has more fully impressed me than ever of the correctness of our position. I must confess that to me it seems so simple to place the government of this whole system of partnership property under the control of a Joint Board instructed to carry out the terms of properly defined Articles of Partnership.
>
> On the other hand, it does seem that endless confusion and, in the end, great irritation must necessarily ensue if there is no joint control, if there are no principles, and if the final decision is to be influenced on either side by political pressures and local influences.[97]

With the whole-hearted concurrence of the Prime Minister and the Minister of Justice but not of the British Ambassador who doubted that the Canadians could expect anything further from Root by way of concession, Gibbons proceeded to Washington to present these arguments to the Secretary of State.[98]

Gibbons was elated with his meetings in Washington with Root, Bacon and Chandler Anderson, the latter being designated by Root at this meeting to undertake subsequent negotiations with Gibbons.[99] Gibbons reported to Laurier that they had canvassed his memoranda point by point and that Root had conceded

> (1) That principles or rules must be adopted dealing with the use of the waters of the Great Lakes System.

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97. Governor General's Papers, No. 268, vol. 4, Memoranda for Mr. Root, June 13, 1908; Laurier Papers, 1908, vol. 522, No. 141478-141487; Gibbons Papers, vol. 14, fol. 1; Numerical File 1906-10, Department of State, National Archives, vol. 484 5934/31; Anderson Papers, box 68; Griffin Memorandum 1958 pp. 31-34; Confidential Prints, International Boundary Waters, vol. 1, pp. 55-57.

98. Gibbons Papers, vol. 6, fol. 2, Letter from Aylesworth to Gibbons, June 15, 1908; vol. 3, fol. 6, Letter from Bryce to Gibbons, June 16, 1908; Laurier Papers, 1908, vol. 522, No. 141484, Letter from Laurier to Gibbons, June 15, 1908; Grey of Howick Papers, vol. 8, No. 002251-002252, Letter from Bryce (in Chicago) to Lord Grey, June 16, 1908.

99. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/31a, Letter from Root to Gen. O.H. Ernst, June 17, 1908.

> (2) That a Joint Commission should have power to enforce the principles so agreed upon.
>
> The adoption of principles limits the powers of the Commission. The two countries make the agreements; the Commission have only the power to enforce them.

While they felt that riparian rights and rights of diversion might cause difficulties due to States' rights, it was agreed that the treaty could possibly provide for protecting interests injured by diversions.

> As a final outcome, he left the matter with Mr. Anderson and myself to thrash out in detail, which we did later. Mr. Anderson was the draftsman of the two treaties which you have completed [boundary delimitation and inland fisheries] and is evidently very familiar with the whole matter.[100]

Agreement was not as complete as Gibbons had suggested, however, and very shortly the British Embassy was indicating that Root still strongly favoured his Commission of Inquiry without governing principles. The Prime Minister was still standing behind the demands of Gibbons. "If, however, no rules and principles are to be agreed upon in advance, I do not see any useful purpose that could be served in further pressing the matter."[101] Bryce was appalled by the inflexibility of the Prime Minister, feeling that Canada must come forth with a new proposal unless it was prepared to accept that put forward by Root. He urged the Governor General to convince Laurier that he should send a new delegation to Washington in November when the diplomatic corps would have returned from summer residence and he noted that it was imperative that the Canadian Government provide him with an official statement in response to Root's proposal for a Commission of Inquiry. Gibbons' memoranda, in his view was merely unofficial.

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100. Gibbons Papers, vol. 8, Letterbook No. 1, 394-395, Letter from Gibbons to Laurier (confidential), June 22, 1908; Laurier Papers, 1908, vol. 523, No. 141780-141781.

101. Laurier Papers, 1908, vol. 524, No. 142044-142045, Letter from Laurier to Esme Howard, chargé d'affaires, British Embassy, June 29, 1908; Grey of Howick Papers, vol. 3, No. 000921-000926, Letter from Laurier to Lord Grey, June 24, 1908.

> I would try to arrange a compromise myself, but can't until I know how far your Government will let me go. My own belief is that if once we had a permanent Commission, even with the limited powers Root agrees to, it would practically soon become a Board, first of Conciliation, then of Arbitration, and would get us out of our difficulties. [102]

Chargé d'affaires Howard persisted in the Embassy's views of the need for a ministerial level conference in Washington in the fall and of the need for a "reasoned reply" by the Canadian Government to the proposals of the Secretary of State.[103] His latter point was supported by the Colonial and Foreign Offices.[104] Gibbons thought that with the imminent agreement between Anderson and himself there was no need for such action. The Prime Minister simply maintained his original position that if the Waterways Commission's proposals were not adopted there would be no treaty at all.

> Laurier's alternative to a Boundary Waters Treaty with principles determined in advance is leaving matters in status quo without any treaty and that, if matters become acute between the two countries in consequence of the absence of a Treaty, he would then wish the questions in dispute to be referred to the Hague. [105]

Before Gibbons returned to Washington to resume his negotiations with Anderson, he reported to Bryce and Laurier in greater detail on his encounter with Root in June.

> I may say to you that Mr. Root during the interview made a long harrangue about the unfriendly attitude that Canadians had assumed towards the Americans for many years in Parliament and through the public press. He seemed very sore about it.
>
> He spoke about the freedom with which people, who had not resumed (sic) "responsibilities" of a nation, were able

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102. Grey of Howick Papers, vol. 8, No. 112255-112257, Letter from Bryce to Lord Grey, June 30, 1908.

103. Laurier Papers, 1908, vol. 525, No. 142254-142256, Letter from Howard to Laurier, July 3, 1908.

104. Governor General's Papers, No. 268, vol. 4, Despatch from Howard to Sir Edward Grey, July 15, 1908; Despatch from Earl of Crewe to Lord Grey, July 23, 1908; Grey of Howick Papers, vol. 3, No. 000949-000951, Letter from Lord Grey to Laurier, July 23, 1908; Confidential Prints, International Boundary Waters, vol. 1, pp. 58-60.

105. Laurier Papers, 1908, vol. 525, No. 142257, Letter from Laurier to Howard, July 7, 1908; Grey of Howick Papers, vol. 8, No. 002263-002273, Letter from Howard to Lord Grey, July 6,1908.

> to talk. He said that it was unbearable; denied that we had been put to any unfair disadvantage by the Alaska award or by the Webster-Ashburton Treaty.
>
> I did not answer him in kind but said that, assuming that all he had said about the Canadian attitude was true, it was only a stronger reason for accepting our proposals which would have an immense effect, not only in allaying the irritation, but in creating a kindly feeling. He got very pleasant later on and expressed his great desire to have the negotiations end in a fair arrangement which would lead to permanent good feeling between the two countries.

Gibbons felt Anderson was favourably inclined to the Canadian position and that they would come up with an acceptable plan providing for principles and for protection of diversions.[106]

Laurier confirmed his support of Gibbons' position and of the Commission's recommendations. He was also curious about Root's outburst.

> This [I.W.C.] report constitutes a very firm rock. We should not depart from it and my intention is to adhere to it.
>
> Do you think that our friend in the State Department was serious when he made that little display, or was it simply a piece of bluff? [107]

Gibbons felt that Root was indeed angry, but more at being "foiled" by Gibbons than at the general Canadian attitude.

> They have not got any ground whatever to stand upon but they hate to recognize the existence of another power on this continent having equal rights.[108]

Gibbons and Howard met in Boston in mid-July to discuss the next step in the negotiations. Howard felt that Gibbons and Root had come to a common agreement on the nature of the commission as a body that would deal with matters as they were referred by a "special agreement". He was not as optimistic

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106. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 401-404, Letter from Gibbons to Bryce (in England), July 3, 1908; pp. 405-407, Letter from Gibbons to Laurier (confidential), July 6, 1908; Laurier Papers, 1908, vol. 525, No. 142314-142319.

107. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons (confidential), July 8, 1908; Laurier Papers, 1908, vol. 525, No. 142320.

108. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 410-411, Letter from Gibbons to Laurier (private), July 9, 1908; Laurier Papers, 1908, vol. 525, No. 142387-142388.

as Gibbons that there was also agreement on the recognition of some fixed general principles to govern the commission. In a subsequent conversation with the Acting Secretary of State, however, he was assured that

> . . . Mr. Root was willing to modify his previous attitude as regards the recognition by the Treaty of general principles for dealing with these questions, at any rate as far as the Great Lakes system was concerned.

He further noted that Mr. Anderson had now been instructed by the United States Government to discuss the matter anew with Gibbons and Bacon to reach a satisfactory agreement.[109]

In correspondence with Gibbons, Howard seemed more concerned with the nature of the commission than he was with the need for general principles.

> It seems to me that as matters stand we ought to try to get it framed to be an Arbitration Treaty dealing with all boundary water questions.
>
> It should establish a strong Commission of jurists (not experts as you rightly said) to act as a permanent arbitral tribunal. And the questions to be submitted to this body would be specified in "special agreements" under the General Arbitration Treaty concluded last spring for reference to the Hague. Thus we should be setting up, as you said, a little Hague over here for all boundary water questions, which might ultimately develop into a Tribunal for the settlement of all questions between Canada and the United States.[110]

For Gibbons, this was but one point to be included in the treaty which he was about to negotiate with Anderson. He enumerated emphatically for Howard <u>all</u> of the points which he felt Root had conceded in the last meeting during June.

1. The Great Lakes--including Michigan--were to be free to navigation by both countries.
2. There would be a statement of principles governing the uses of boundary waters and a permanent board to enforce them.

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109. Governor General's Papers, No. 268, vol. 4, Despatches from Howard to Sir Edward Grey, July 15 & 22, 1908; Confidential Prints, International Boundary Waters, vol. 1, pp. 58-60.

110. Gibbons Papers, vol. 3, fol. 6, Letter from Howard to Gibbons, July 26, 1908.

3. There would be the adoption of "some principles" governing transboundary streams.
4. A permanent board to receive references upon the request of either country and with power to report findings and make recommendations was to be set up.
5. The board would act as an arbitration tribunal whenever this was agreed upon by the two countries.[111]

At the end of July Gibbons and Anderson agreed to meet about the middle of August in New York, Anderson promising that meantime he would try to formulate a plan as the basis for discussions.[112] In full confidence of early success, Gibbons proceeded to Washington for consultations. Howard observed:

> Gibbons is very sanguine of success in getting a satisfactory Draft Boundary Waters Treaty and I sincerely hope he may succeed. I think it is possible that more will be conceded of the State Department to Canadians negotiating direct than would be to this Embassy if it is felt that there is no diplomatic triumph over England to be obtained out of any negotiation (there is ever yet a hereditary and traditional desire even on the part of the best disposed to give the lion's ear a tweak or his tail a little twist) in which Canada is involved.[113]

Gibbons and Anderson met on August 22 and 23, discussed the chief objections to the earlier Canadian and United States draft treaties and agreed that Anderson should draft a new treaty embodying the following points: freedom of navigation on the Great Lakes system, principles of international law governing the obstruction and diversion of boundary and transboundary waters, appointment of a permanent commission to consider and decide cases involving application of the principles, provision for the same body to act as an advisory board in respect to any matters in dispute arising with regard to property rights of any kind between the two countries and creation of the same body as a permanent board of arbitration to which by consent of both countries any matter of dispute might be referred for

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111. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 412-413, Letter from Gibbons to Howard, July 30, 1908.

112. Gibbons Papers, vol. 6, fol. 2, Letter from Anderson to Gibbons, July 31, 1908; Anderson Papers, box 65, p. 159; box 68, Letter from Gibbons to Anderson, Aug. 1, 1908; box 65, p. 166, Letter from Anderson to Gibbons, Aug. 11, 1908.

113. Grey of Howick Papers, vol. 8, No. 002277-002282, Letter from Howard to Lord Grey, Aug. 13, 1908.

final decision. Gibbons informed Laurier that Anderson was favourably disposed to all of these points and that Root was aware of Anderson's disposition. He promised to submit the treaty to the Prime Minister in about two weeks in hopes that Laurier would have it as "good election material for the fall."[114]

At the same time, Anderson submitted to Root "at the urgent request of Mr. Gibbons" a draft of a proposed treaty relating to international boundary waters and other matters, seeking the advice of the Secretary before he proceeded further in the negotiations. Noting that his discussions with Gibbons were purely informal and unofficial and that he would not meet him again unless Root so advised, he went on:

> . . . Mr. Gibbons, of course, has not seen this draft, but at our conference I outlined, without going into details, the general provisions and method of treatment which I have since amplified and embodied in this draft, and at that time he expressed himself as prepared to agree to a treaty upon the basis proposed, subject to a revision of details, and he is exceedingly anxious to have another conference with me on the matter early in September.
>
> ....
>
> In order to avoid many of the difficulties which were presented by the draft treaty prepared by Messrs. Clinton and Gibbons, I have drawn a distinction between boundary waters . . . and the waters which are tributary to boundary waters or merely flow across the boundary. With respect to this latter class of waters I have provided that each side shall retain exclusive jurisdiction and control over them within its own borders, and at the same time provision is made for subjecting any new uses of such waters on each side to the same legal restraints and liability with respect to resulting damages on the other side as would arise if the damages occurred within the jurisdiction wherein the uses causing such damages occur. These provisions are made subject to certain exceptions. With respect to the "boundary waters" I have made their use and diversion in certain cases conditional upon the approval of a joint international commission, and have proposed certain principles or rules to govern the action of the commission. In addition to these provisions

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114. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 418-420, Letter from Gibbons to Laurier (personal), Aug. 25, 1908; Laurier Papers, 1908, vol. 531, No. 143873-143875; Confidential Prints, International Boundary Waters, vol. 1, pp. 62.

> I have also made special provision for the right of free navigation of boundary waters on both sides, extending this right to the waters of Lake Michigan during the continuance of the treaty. Special provision is also made for the Chicago Drainage Canal and for the use of the waters of the Niagara River for power purposes. I have also included in the treaty the provisions of the draft treaty proposed last January for a joint commission of inquiry. The general provisions relating to the powers and procedure of the commission follow as closely as possible the provisions of the draft treaty above referred to and the Clinton-Gibbons draft.

The priority of uses suggested by Anderson's draft was to have application only to boundary waters and was based upon "the greatest number, which recommends itself as the natural and reasonable basis to adopt, and has the additional advantage of expediency for it disarms opposition and assures the support of the great majority of those interested." Domestic and sanitary uses were put first because they would benefit and thus secure "the approval and support of all the inhabitants living along the boundary." Navigation had precedence over irrigation and power purposes simply because it seemed "more important to the general welfare of the country. Uses for power purposes, generally speaking, benefit only a very limited number."

> You will observe that I have not included any provision for arbitration in case of disagreements by the Commission. Instead I have inserted a provision in Article VIII requiring the two Governments to endeavour to agree upon an adjustment. If they cannot agree it is always open for them to submit the disagreement to arbitration, but it seems preferable that such special arrangement for arbitration as may be appropriate in each case should be made by the two Governments rather than by the Commission, as was proposed in the Clinton-Gibbons draft.
>
> I have made no provision conferring any jurisdiction upon the Commission to hear and determine generally any matters of dispute, for it does not seem to me to

be suitably constituted for this purpose.[115]

Draft
INTERNATIONAL WATERWAYS TREATY C.P.A.
August 1908

Article I

. . . it is hereby agreed by the High Contracting Parties that the navigation of all [boundary] waters shall forever remain free and open on each side of the boundary to the inhabitants and to the ships, vessels and boats of both countries equally . . .

It is further agreed that so long as this treaty shall remain in force, this same right of free navigation shall extend to the waters of Lake Michigan and to all canals . . .

Article II

Each of the High Contracting Parties reserves to itself ... the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters ... and in order to extend the equal protection of the laws on each side to cover any injury or damage which may result on one side of the boundary from the exercise in the future of the exclusive jurisdiction and control hereby reserved over such waters on the other side, the High Contracting Parties agree that . . . any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury or damage on the other side of the boundary, shall be subject to the same rights and restraints and impose the same obligations, and entail the same legal consequences, and justify the same legal remedies as if such injury or damage took place within the territory and under the jurisdiction of the Government . . . within whose territory such diversion or interference actually occurs.

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115. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/44-45, Letter from Anderson to Root, Aug. 26, 1908; Anderson Papers, box 65, pp. 197-203; Griffin Memorandum 1958, pp. 35-37. Note: The idea of compensation for injury caused through diversion of transboundary and tributary waters included in this draft was first suggested by Anderson to Root in early June when he proposed that "instead of referring questions arising with respect to the use of such waters to an international commission for decision, they might preferably be dealt with as if the damages on either side of the boundary resulting from the diversion of or interference with such waters on the other side occurred within the jurisdiction of the Government within whose borders the diversion or interference actually took place." : Anderson Papers, box 68, Letter from Anderson to Root, June 2, 1908.

Article III

With respect to the use and diversion of boundary waters . . . the High Contracting Parties agree that . . . no further or other uses or obstructions or diversions, whether temporary or permanent, of such waters materially affecting the natural level or flow thereof shall be made on either side of the boundary until and unless the authority to make such uses or obstructions or diversions shall have been granted in such manner as may be provided for by the United States and the Dominion of Canada on their respective sides of the boundary and approved, as hereinafter provided, by a joint commission, to be known as the International Waterways Commission ...

....

Article IV

It is hereby agreed that the amount of water which shall be permanently diverted from Lake Michigan for the purposes of the Chicago Drainage Canal shall not exceed cubic feet per second, so long as this treaty shall remain in force.

Article V

(Insert provisions covering St. Mary and Milk Rivers if agreed upon in time.)

Article VI

(Insert provisions relating to Niagara River as proposed by Root in February.)

Article VII

The High Contracting Parties agree to establish a joint International Waterways Commission composed of six commissioners, three on the part of the United States and three on the part of Great Britain, to be appointed as follows:

> The three Commissioners on the part of the United States shall be appointed by the President of the United States, by and with the advice and consent of the Senate . . .
>
> The three Commissioners on the part of Great Britain shall be appointed by . . .

It is the desire of the High Contracting Parties that, so far as may be convenient, one of the commissioners appointed

on each side shall be a lawyer of experience in questions of international and riparian water law, and one an engineer well versed in the Hydraulics of the Great Lakes.

....

Article VIII

This International Waterways Commission shall have jurisdiction over and shall pass upon all applications for the use or obstruction or diversion of the waters hereinabove defined as boundary waters in all cases where under Article III of this treaty the approval of this Commission is required, and in passing upon such applications the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

It is agreed that the High Contracting Parties shall have equal and similar rights in the use of the waters hereinabove defined as boundary waters, subject to any paramount use mutually recognized or otherwise imposed upon such waters . . . and neither side shall be at liberty to so use the boundary waters on its own side as to encroach upon the co-extensive rights on the other.

It is further agreed that the following order of precedence shall be observed among the various uses enumerated below for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for necessary domestic and sanitary purposes;
(2) Uses for navigation, including service of canals for the purposes of navigation.
(3) Uses for irrigation and for power purposes; and among the latter uses, those involving temporary diversions shall have precedence over those involving permanent diversions of such waters.

....

In all cases where any uses or diversions of any portion of the boundary waters on either side will diminish the amount available from the same body of water for the same class of uses or diversions on the other side, the right of both sides to an equal division shall be observed, but this requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary rivers or waters at points where such equal division cannot advantageously be made . . . and where such diversion does not diminish elsewhere the amount available for use on the other side.

....

It is further agreed that the . . . boundary waters shall not be polluted on either side to the injury of health or property on the other.

The Commission in its discretion may make its approval of any application conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed.

No remedial or protective works in boundary waters and no dams or other obstructions to elevate the level of boundary waters shall be constructed therein until suitable and adequate provision, approved by the Commission, is made for the protection and indemnity of all interests on both sides which may be injured or damaged thereby.

....

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The two Governments shall thereupon endeavor to agree upon an adjustment of the questions or matters of difference, and if an agreement is reached between the two Governments, it shall be . . . communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

Article IX

The High Contracting Parties further agree that any questions or matters of difference arising between the United States and the Dominion of Canada involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, shall be referred from time to time to the International Waterways Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Waterways Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, if called for, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

The reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

> The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports, each to his own Government.
>
> In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.
>
> ....
>
> Article X
>
> (Providing for organization and procedure of the Commission.)
>
> Article XI
>
> (Defining the term "special agreements".) [116]

The Prime Minister was enthusiastic at the prospect of a treaty as described by Gibbons after his meeting with Anderson, suggesting such an agreement would be "the greatest benefit ever bestowed on Canada during the last fifteen years." He felt, however, that in compliance with the request from the Colonial Office of July 23, Gibbons should prepare a paper for formal presentation by the Canadian Government to refute the earlier proposals of Root.[117] Gibbons objected to this, feeling that nothing should now be done to embarrass Root who seemed to be coming around to the Canadian point of view. Success in the new negotiations, he felt assured, was near at hand.

> It is simply applying, as between these two nations, the principles which have been for ages applied between individuals of having a judicial tribunal settle disputes instead of the parties fighting it out, or doing what was just about as bad -- referring the matter to a board of advocates (called arbitrators) to see who could obtain the advantage.

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116. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/44-45, Draft International Waterways Treaty, August 1908; Anderson Papers, box 65, pp. 197-203; Griffin Memorandum, 1958, pp. 37-41.

117. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons, Aug. 28, 1908; Laurier Papers, 1908, vol. 531, No. 143876.

> I want to emphasize the fact that in our last interview Mr. Root did concede that principles had to be adopted, and it was in view of that concession that Mr. Anderson and myself are continuing our work.[118]

Laurier persisted in his view that an official reply must be prepared for Root.[119] Gibbons complied, but instead of preparing the necessarily controversial document, merely set out the points on which he felt that he and Root were now in agreement.[120] The memorandum was, it seems, never sent.

The British Ambassador, in London during this time, wrote to congratulate Gibbons on hearing the outcome of the Gibbons-Anderson negotiations.[121] However, he was still prepared, if necessary, to settle for less. In a letter to the Governor General he wrote:

> Gibbons is sanguine, and I hope he has grounds for his confidence. I have always believed we should get a Treaty worth something, but have fancied that Sir W.L. might refuse to have one which did not go so far as he desired. While entirely approving and entering into his view, I believe that less than he asked for would still be worth having. Gibbons thinks so, and L. has much faith in Gibbons and may be influenced by the latter's opinion to accept less than he originally demanded.[122]

Root acknowledged receipt of Anderson's draft indicating that he would try to take it up with Anderson by the end of September.

> . . . There are a good many things in it which I should like to talk with you about, and there are some things which strike me very favorably, but which I ought to talk with some of the Senators about before we take any steps towards committing ourselves.[123]

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118. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 426-427, Letter from Gibbons to Laurier (confidential), Aug. 31, 1908; Laurier Papers, 1908, vol. 531, No. 144043.

119. Laurier Papers, 1908, vol. 531, No. 144046, Letter from Laurier to Gibbons, Sept. 2, 1908.

120. Laurier Papers, 1908, vol. 532, No. 144285, Letter from Gibbons to Laurier, Sept. 4, 1908, enclosing memorandum for Root.

121. Gibbons Papers, vol. 3, fol. 6, Letter from Bryce to Gibbons, Sept. 4, 1908.

122. Grey of Howick Papers, vol. 8, No. 002200A-002203A, Letter from Bryce to Lord Grey, Sept. 21, 1908.

123. Anderson Papers, box 68, Letter from Root to Anderson, Sept. 2, 1908.

Due to his absence from Washington, however, Root was delayed in dealing with the draft, and Anderson had to placate the impatient Gibbons.[124]

In early October the Second Assistant Secretary of State submitted his comments to Root on the "practicability and advisability" of such a treaty.

> "1. As to practicability:
> Any scheme by which the determination of questions and international controversies regarding the use of boundary waters, the conservation and betterment of their navigable conditions . . . should be relegated to a commission having expert competence and judicial attributes, would be practical, and therefore practicable.
>
> 2. That being so, an adequate scheme, meeting the conditions of practicability, would be advisable."

The Assistant Secretary found Anderson's draft "quite practical", allowing for most conditions which had developed in the international waterways.

> Article II is particularly important because dealing with the question of damage occasioned on one side of the boundary by changes in the use and flow of water on the other side meets the cases of the St. Mary's (sic) and Milk Rivers and any other similar cases which may arise.

His major criticism was that

> . . . Article IX appears to give unlimited powers to the proposed International Waterways Commission over any and all controversies between the United States and Canada involving any and all "rights, obligations or interests of either in relation to the other or to the inhabitants of the other along their common frontier." This would give the Commission jurisdiction of every possible contention between Canadians and Americans, from Passamaquoddy to Juan de Fuca. I think something like "in respect to matters embraced in this Convention" might be added.[125]

On October 20, Anderson revised the draft clauses slightly, adding a preliminary article defining boundary waters, rewriting Article II to make its terms clear and adding a final

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124. Gibbons Papers, vol. 3, fol. 7, Letter from Anderson to Gibbons, Sept. 9, 1908; Anderson Papers, box 65, pp. 228; box 68, Letter from Gibbons to Anderson, Sept. 10, 1908.

125. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/44-45, Memorandum from A.A. Adee to Root, Oct. 9, 1908.

article dealing with the duration of the treaty.[126] This revised draft he submitted along with an accompanying explanation to Root. In this note, he pointed out that the common practice in establishing commissions between Great Britain and the United States was to have the United States commissioners appointed by the President without reference to the Senate.[127] In the ensuing discussions between Anderson and Root, the only change which the Secretary proposed to make in the draft was the article dealing with appointment of the commissioners; they would be appointed by the President alone.

On November 12 Anderson sent Gibbons the revised draft and suggested that the two of them get together immediately for final discussions.[128] Gibbons was quite satisfied with the draft;[129] the only significant change he proposed at this point was the addition of a clause permitting the Commission to act as an arbitral tribunal in cases referred to it by the Governments.[130] He sent a revised draft to Anderson which, in addition to embodying the arbitral clause defined boundary waters more broadly, limited the Chicago diversion to 10,000 cubic feet, provided for appointment of the Canadian commissioners by the Governor in Council, gave the treaty a twenty-five year duration and changed the name to simply "International Commission".131 Gibbons conveyed

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126. Anderson Papers, box 68, (Revised Draft) International Waterways Treaty, Oct. 1908.

127. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/50-51, Memorandum from Anderson to Root, Oct. 20, 1908; Anderson Papers, box 65, pp. 283-293.

128. Gibbons Papers, vol. 3, fol. 7, Letter from Anderson to Gibbons, Nov. 12, 1908; Anderson Papers, box 68, Letter from Anderson to Gibbons, Nov. 12, 1908, enclosing draft treaty; box 65,p.337.

129. Gibbons Papers, vol. 8, Letterbook No. 1, p.473, Letter from Gibbons to Anderson, Nov. 14, 1908; Anderson Papers, box 68.

130. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 475-476, Letter from Gibbons to Bryce, Nov. 16, 1908; pp. 477-478, Letter from Gibbons to Laurier, Nov. 16, 1908; pp. 481-482, Letter from Gibbons to Aylesworth, Nov. 24, 1908.

131. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 483-484; Letter from Gibbons to Anderson, Nov. 24, 1908; Anderson Papers, box 68, Letter from Gibbons to Anderson, Nov. 24, 1908, enclosing counter-draft of treaty.

to the Prime Minister his immense pleasure with the turn of events.

> You will see by the draft that they have yielded on our every contention. I do not look upon it at all in the light of a surrender on their part. It simply means that Mr. Root has brains enough to see that their policy towards this country has been foolish and that it is now in their interest to play the game fairly with us.[132]

Gibbons and Anderson met in New York on November 27 and December 2 to discuss their respective proposals and they agreed that provisions for irrigation on the prairies and for diversions at Niagara Falls should be included in the treaty. Anderson agreed to the inclusion of a provision allowing the commission to act as an arbitral tribunal, but only with the advice and consent of the Senate. He indicated, however, that all mention of the Chicago diversion and any limitation thereon must be omitted from the treaty at the insistence of Mr. Root. Gibbons acquiesced, but only on condition that Article II have an additional clause added:

> The foregoing provision shall not be construed as an agreement authorizing diversions on either side which in their effect would be productive of material injury to the navigation interests on the other side.

They agreed to add to Article III a provision placing under the jurisdiction of the commission cases involving the raising of the water level across the boundary in transboundary waters. This provision was then renumbered Article IV and added to it was the provision prohibiting pollution in boundary and transboundary waters. The clause in Article VII dealing with the technical qualifications of the commissioners (lawyers and engineers) was dropped by Anderson because he felt that it was no longer appropriate if the body was to be required to act as an arbitral tribunal. The duration of the treaty was set at five years. Finally, in addition to a number of other minor

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132. Laurier Papers, 1908, vol. 544, No. 147747-147748, Letter from Gibbons to Laurier (private), Nov. 16, 1908.

changes, the name of the commission was finally designated by Anderson as the "International Joint Commission." [133]

The two negotiators agreed that Anderson would now undertake a new draft embodying these changes and proposals and Gibbons again submitted to the Prime Minister an optimistic report.

> It is quite evident to me that these people have determined on changing their entire policy toward Canada. I think they see the mistake they have made in the past in that regard and are anxious now to show their friendliness and are undoubtedly anxious to enter into reciprocal negotiation. [134]

H. Anderson-Gibbons Draft Treaty

On December 3 Anderson completed a new draft which he sent to Root and to Gibbons on December 5. The draft omitted all reference to the Chicago diversion but did not provide for the additional clause in Article II requested by Gibbons. Anderson explained this omission.

> The addition of this clause seems to me on reflection to renew the difficulty which we were trying to avoid in regard to the Chicago Drainage Canal, and as I am at a loss to see how it can be satisfactorily amended, I have omitted it altogether. Perhaps you will be able to suggest some other solution which will be satisfactory.

Article IV which had dealt with the Chicago diversion in the earlier draft now provided:

> The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works, or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary, unless

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133. Anderson Papers, box 68, Letter from Anderson to Root, Nov. 24, 1908; International Waterways Treaty: Revised Draft, Nov. 27, 1908; Treaty Relating to Boundary Waters and Questions arising Along the Boundary Between the United States and Canada (Revised Draft), Dec. 2, 1908; Griffin Memorandum, 1958, pp. 41-42.

134. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 486-487, Letter from Gibbons to Laurier, Dec. 2, 1908; Laurier Papers, 1908, vol. 547, No. 148391-148392.

> the construction or maintenance thereof is approved by the aforesaid International Joint Commission.
>
> It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

Articles V and VI remained open for inclusion of the prairie irrigation and Niagara clauses and the remainder of the draft was essentially in the form in which it appeared in the final draft, the form agreed upon at the December 2 meeting.[135] Anderson also sent along to Gibbons a proposed clause dealing with the St. Mary and Milk Rivers and a few days later, one covering the Niagara Falls situation.[136]

Gibbons first asked Dr. W.F. King who had been studying the prairie irrigation problem with Mr. Newell of the United States to prepare a draft clause dealing with the St. Mary and Milk Rivers as Gibbons was not satisfied with the United States draft clause.[137] He then turned to preparing a reply to Anderson's new draft treaty and to the Niagara draft clause.

> . . . We seem now to have got everything in fair shape except Article 2. You must see that this is not in satisfactory shape. Yielding to Mr. Root's suggestion, we have left out the provision dealing with Chicago. As the matter stands now, under Article 2 unlimited diversion is authorized at Chicago and in Minnesota.
>
> It happens in the working out of matters that the new Article 4, dealing with obstructions, will work to the advantage of your people, I think in every case. I have no objection to it because I think it is right on principle, but I think that the other principle adopted by our Commission was right also -- that diversions should not be permitted having an injurious effect upon interests in the other country.

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135. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/55-56, Letter from Anderson to Root, Dec. 5, 1908, enclosing Second Draft, C.P.A., Dec. 3, 1908; Anderson Papers, box 68, Letter from Anderson to Gibbons, Dec. 5, 1908, enclosing Second Draft, C.P.A. Dec. 3, 1908.
136. Anderson Papers, box 68, Letter from Anderson to Gibbons, Dec. 8, 1908, enclosing Draft of Provision for the Preservation of the Falls and Rapids of Niagara River; Gibbons Papers, vol. 3, fol. 7.
137. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 493-495, Letters from Gibbons to King, Dec. 10 & 17, 1908.

> I am quite content, however, to waive this very important point for the sake of the general treaty, and because I feel that, as a whole, Mr. Root is dealing with the matter fairly and in a broad spirit, but it is impossible to let this Article 2 go without some restriction.
>
> I do not want to interfere with the sovereign right of each nation to deal with its own, but Article 2 as it now stands would justify any diversion, no matter how injurious to the public interests, in boundary waters or in the other country.
>
> I think it would be wise to get this matter into shape before seeing Sir Wilfrid, and therefore am postponing my visit to Ottawa until I hear from you again. I propose when there to try and get the Milk River matter into shape also. It did seem that the provision which we drew when in Washington ought to be added in Article 2. If that is not acceptable, how would this do:
>
> > Nothing in this Article is intended to authorize diversions in one country which will seriously interfere with public rights of navigation in boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary; and while each of the High Contracting Parties reserves its sovereign right of dealing with such diversions, each recognizes that it is desirable that such right should not be unnecessarily exercised to the injury of public interests in such boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary.
>
> . . . .
>
> P.S. - These suggestions, of course, are only my own personal views and are subject to the approval of the Government at Ottawa.

With regard to the Niagara draft, Gibbons rejected the proposal for a division of the waters below the Falls of 26,000 cubic feet for the United States and 14,000 cubic feet for Canada, insisting that the restriction on diversion should apply only above the Falls, the general principle of equal division having application elsewhere.[138]

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138. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 490½-492, Letter from Gibbons to Anderson, Dec. 10, 1908; pp. 498½-499, Letter from Gibbons to Anderson, Dec. 15, 1908; pp. 506-507, Letter from Gibbons to Anderson, Dec. 16, 1908; Anderson Papers, box 68, Letter from Gibbons to Anderson, Dec. 10, 1908; Griffin Memorandum, 1958, pp. 42-43.

Anderson replied with a counter-proposal to Gibbons' draft of a second paragraph for Article II, and the clause was incorporated in the final draft in this form.

> It is understood, however, that neither Government intends by the foregoing provision to surrender any right, which it may have, to object to any diversion of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

As Anderson noted, this wording "has the advantage of requiring no explanation, and if it meets your views it will be acceptable here."[139] Gibbons felt that this proposal met the problem quite adequately.[140]

On December 16, Gibbons submitted to the Prime Minister and to the British Ambassador copies of the Anderson draft treaty as modified by the changes suggested by Gibbons. He pointed out that the only provision now to be added was the article covering the prairie irrigation. He explained to the Prime Minister that while the principle of non-obstruction of tributary and transboundary waters was provided for in Article IV, the United States would not agree to a non-diversion principle and hence Article II was an attempted compromise. He wondered, in view of the absence of any clear rule of international law governing the rights of diversion, if perhaps Article II was not preferable in any case preserving as it did sovereign rights while at the same time protecting injured private interests where diversions occurred. He pointed out the value of the protective proviso which he had insisted on adding as the second clause of Article II. He emphasized the value of the treaty.

> It means that, with the consent of the Mother Country and greatly to her relief, we are assuming the obligation of dealing directly with the Americans with relation to matters peculiarly our own. There is no reason why her larger relations with the United States

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139. Gibbons Papers, vol. 3, fol. 7, Letter from Anderson to Gibbons, Dec. 14, 1908; Anderson Papers, box 68.

140. Anderson Papers, box 68, Letter from Gibbons to Anderson, Dec. 16, 1908; Griffin Memorandum, 1958, p. 43

should be subject to constant causes of irritation by her being forced to play the part of the policeman for our protection on this continent.

A permanent, judicial body must, of necessity, play the game fairly. If the commissioners adopted the attitude of the ordinary partisan arbitrator there would be a deadlock at once. Our Commission [Waterways Commission] has unanimously agreed upon every subject referred to it. Such a body can only exist by its members being honest with each other. Thus the importance of the conclusion which the Americans have made in conceding principles applicable alike everywhere is a tremendous advantage to us.

....

With the single exception of Article 2, the treaty is exactly on the lines what we have contended for and, as I said before, I am not quite sure that Article 2 is not in safer form now than it would have been if our original recommendation had been adopted.[141]

SECOND DRAFT

Treaty relating to Boundary Waters and Questions arising along the Boundary Between the United States and Canada.

Preliminary Article

"Boundary waters" defined for purposes of the treaty.

Article I

Freedom of navigation ensured for both countries on all navigable boundary waters and including Lake Michigan.

Article II

Reservation of the sovereign right to use and divert transboundary and tributary waters in each country, subject to compensation of injured parties on either side by the other. Preservation of the right of one country to object where navigation is materially affected by the actions of the other.

Article III

Obstructions and diversions of boundary waters to be permitted only with the consent of the Commission.

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141. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 500-505, Letter from Gibbons to Laurier, Dec. 16, 1908; pp. 508-509, Letter from Gibbons to Bryce, Dec. 16, 1908; Laurier Papers, 1908, vol. 549, No. 148967-148972.

Article IV

Obstructions of transboundary and tributary waters raising the level of the waters on the other side of the boundary to be permitted only with the consent of the Commission. Transboundary water pollution prohibited.

Article V

Diversion of waters above Niagara Falls to be limited to 20,000 cubic feet for the United States and 36,000 cubic feet for Canada "so as to preserve the scenic effect of the River and Falls."

Article VI

Creation of the International Joint Commission and appointment of the Commissioners by the President and the Governor in Council.

Article VII

Establishment of the Commission's jurisdiction; order of precedence in uses of boundary waters; nature of decisions to be made by the Commission.

Article VIII

Establishment of Commission's reference power on any other matters which the Commission would study, report and recommend upon as requested. No decisions permitted.

Article IX

Arbitral power of the Commission established and limited to any matter referred by the Government of Canada and the President with the concurrence of the Senate. Decisions to be binding.

Article X

United States and Canadian Secretaries of State to receive the reports of the Commission.

Article XI

Organization and procedure of the Commission provided.

Article XII

Power to the two Governments to avoid treaty provisions by making special agreements.

Article XIII

Treaty to continue for five years and after until terminated by one year's notice.[142]

On December 19, Gibbons sent to Laurier a letter assuring him that Article II would work out satisfactorily and summarizing again the immense values of the treaty.[143] Two days later, he received a letter from Anderson indicating that he was in agreement on the revised draft with the exception of the Niagara clause which he noted must be couched in terms of protection of shipping on Lake Ontario rather than with reference to the protection of the scenic effects due to the constitutional limitations in the United States. Anderson agreed that the Milk and St. Mary Rivers article should be included if time allowed, noting that the treaty must be finalized before January 1 because Root would be leaving the Cabinet in mid-January to take his seat in the Senate. He injected a new obstacle to quick acceptance of the treaty by Canada, however, in noting that it was the understanding of his Government (presumably from Gibbons) that Canada would not, after the treaty was ratified, continue its objection to permission being granted by the United States Government to the Minnesota Power Company to divert tributary waters of the Rainy River in Minnesota. To accomplish this, he suggested, a note must be forthcoming from the Canadian Government waiving its alleged rights under Article II of the Treaty of 1842 to have these boundary waters "free and open to the use of the citizens and subjects of both countries."[144] He asked Gibbons to come to Washington immediately to clear up this point and to deal with the St. Mary and Milk Rivers clause.[145]

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142. Gibbons Papers, vol. 14, fol. 3, Second Draft submitted by Gibbons to Laurier and Anderson, Dec. 16, 1908; Confidential Prints, International Boundary Waters, vol. 1, pp. 63-67; Anderson Papers, box 68.

143. Laurier Papers, 1908, vol. 550, No. 149145-149147, Letter from Gibbons to Laurier, Dec. 19, 1908; Gibbons Papers, vol. 8, Letterbook No. 1, pp. 513-515.

144. Gibbons Papers, vol. 3, fol. 7, Letter from Anderson to Gibbons, Dec. 21, 1908; Anderson Papers, box 65, pp. 363-365.

145. Anderson Papers, box 65, p. 369, Letter from Anderson to Gibbons, Dec. 26, 1908.

Gibbons apparently did not communicate this thorny problem of Article II to Laurier immediately; rather he pressed upon the Prime Minister the urgency of including a now-drafted prairie irrigation clause and getting the treaty signed immediately. Laurier was not to be rushed after the lengthy negotiations which had taken them to this point.

> Provisions as to Chicago canal should be included. Nothing about Milk River should be included unless first submitted to us. Make no haste; better have treaty postponed for a few days before signature rather than not have clear understanding upon everything.[146]

Bryce replied that a Chicago diversion clause would be impossible to obtain and that Laurier should not insist. He noted that the Milk-St. Mary Rivers draft article was acceptable to Gibbons and himself and that the "[a]mendments so far agreed upon have been sent to London asking for approval of Treaty."[147] Laurier indicated to Lord Grey that there seemed to be no point in pressing further for the inclusion of the Chicago diversion.[148] The Governor General remained hopeful of a successful conclusion.

> . . . That little grey terrier [Gibbons] has done well. I understand Root wishes to get the Treaty signed by January 1 and to submit it to Congress (sic) on January 4th.[149]

The old year left an air of optimism. The new was to usher in some fresh obstacles.

The draft article dealing with the St. Mary and Milk Rivers had been drawn by Dr. W.F. King and modified slightly by Gibbons and Anderson. As agreed by them and submitted to Laurier on December 30, it provided that the St. Mary and Milk in Montana and Alberta (but not Saskatchewan) were to be treated as one and

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146. Laurier Papers, 1908, vol. 552, No. 149548, Telegram from Laurier to Gibbons (in Washington), Dec. 30, 1908.

147. Laurier Papers, 1908, vol. 553, No. 149726, Telegram from Bryce to Lord Grey (secret), Dec. 31, 1908.

148. Grey of Howick Papers, vol. 3, No. 001046-001052, Letter from Laurier to Lord Grey, Dec. 31, 1908.

149. Grey of Howick Papers, vol. 8, No. 002224A-002230A, Letter from Lord Grey to Bryce, Dec. 26, 1908.

the total available water was to be divided equally over all but not in respect to each stream. Canada was to have a prior right of appropriation of 360 cubic feet from the St. Mary during irrigation season and the United States, a similar right from the Milk with the additional right of using the Milk channel in Canada to carry waters of the St. Mary from the United States. Article II was to apply to any injuries occurring in Canada from diversions in the United States. Measurement was to be under the supervision of the Commission.[150] Gibbons was angered by Laurier's caution in relation to this article as well as by his proposal for inclusion of the Chicago diversion. On January 1, 1909, he wired to the Prime Minister.

> Draft sent you drawn as result of full conferences. Imprudent to even submit your proposal without friction and danger to whole treaty. In my opinion they are not asking anything whatever more than is perfectly reasonable. Equal division of the prairie irrigation waters highly reasonable. Knowing Mr. Root's attitude am certain that if we insist on alterations he will let whole matter go. I cannot take responsibility of throwing away tremendous benefits of treaty . . . If you insist and are not willing to have the treaty signed on basis arranged think someone else than myself should come here and assume responsibility immediately.[151]

Laurier sought to pacify Gibbons.

> Whole matter about Milk and St. Mary's (sic) is new to me. Will send Pugsley to-morrow reaching Washington Sunday afternoon. Please wait.[152]

In a letter to Gibbons next day, Laurier indicated that he was not about to change his mind on these matters and, indeed, was beginning to have "sober, second-thought" about the treaty generally. "I am more convinced than ever that we must go

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150. Gibbons Papers, vol. 14, fol. 3, Copy of Preliminary Draft of Article VI (undated).

151. Laurier Papers, 1909, vol. 553, No. 149724, Telegram from Gibbons to Laurier, Jan. 1, 1909.

152. Laurier Papers, 1909, vol. 553, No. 149725, Telegram from Laurier to Gibbons, Jan. 1, 1909.

slowly and must make sure of our ground before we commit ourselves."[153]

Gibbons returned quickly, in a fighting mood to Ottawa to extract from Laurier approval of the remaining clauses. Lord Grey sent to Bryce an account of the encounter in his office.

> . . . Gibbons had a long and loud interview with Laurier yesterday in my office, lasting over two hours. Gibbons fought splendidly. Sir Wilfrid adhered to the position that Gibbons' duty and his own was finished when they had secured the assent of the United States Executive to the Draft Treaty: that it should not rest with the Dominion Government to consider the attitude of the Senate.

Laurier objected strongly to the argument advanced by the United States Government that while it agreed with the Canadian Government on the desirability of controlling the diversion at Chicago, it could not include such a provision because the Senate would not ratify it. Gibbons persisted in his arguments and finally Laurier deferred to Gibbons on all matters but the Milk and St. Mary Rivers apportionment arguing that Gibbons did not understand irrigation matters.[154]

Gibbons returned to Washington immediately to see if some other arrangement could be worked out in relation to the prairie irrigation situation since Laurier still insisted on an equal division of the waters for irrigation throughout the year. On January 8, he reported to the Prime Minister and the Minister of Justice that Laurier's proposal was "physically impossible if rivers are connected and illogical since our needs are for much water from St. Mary and almost none from Milk. On the other hand U.S. requires most water from the Milk" during the irrigation season. He sent along a new draft clause providing for equal apportionment of the combined waters of the two rivers in Montana, Alberta and Saskatchewan for irrigation

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153. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons, Jan. 2, 1909.

154. Grey of Howick Papers, vol. 9, No. 002244A-002247A, Letter from Lord Grey to Bryce, Jan. 5, 1909.

and power purposes, subject, during the irrigation season, to a prior appropriation to the United States of 500 cubic feet or three-quarters of the flow of the Milk River and a like prior appropriation for Canada on the St. Mary. Gibbons pointed out that the Canadian Cabinet had the choice of accepting this draft or the earlier one, but not the one proposed by Laurier. Noting his distress in finding "all my work depreciated (sic) by those from whom I have the least right to expect it", he indicated that he was coming to Ottawa on the understanding that the Cabinet would take speedy and positive action on the treaty.[155]

> I repeat, little as it seems to be appreciated, that its every clause is of advantage to us. Even as to the Milk River difficulty, this settlement, in my opinion, is advantageous.[156]

Bryce, meanwhile, had submitted the draft treaty to the Foreign Office for its approval. That Office proposed a number of changes, all of them of a formal nature, but each indicating the plain fact that Canadian foreign relations were under the prerogative domain of the Imperial Government. Every reference in the treaty to the "Government of Canada" was replaced with the term "High Contracting Party" (Great Britain). "Citizens of Canada" became "subjects and citizens of the High Contracting Party" and "Secretary of State for Canada" became "Governor General". Appointment of the Commissioners would be done not by the "Governor in Council" but rather by "His Majesty, on the recommendation of the Governor in Council". The only concession to Canadian autonomy appeared in the arbitration provision (Article X) where such matters might be submitted "on the part of His Majesty, with the consent of the Governor

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155. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 522-526, Letter from Gibbons to Aylesworth (private and confidential), Jan. 8, 1909.

156. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 533-535, Letter from Gibbons to Laurier (confidential), Jan. 8, 1909.

General of Canada in Council". Subject to these changes, consent was given to sign the treaty for Great Britain.[157]

Lord Grey promptly brought pressure to bear on the Prime Minister.

> Gibbons' Treaty I regard as a triumph for him personally and Canadian diplomacy, and the loss of this treaty which gives Canada so big a Niagara Preference, which gives effect to the policy you have by means of Gibbons' ramrod forced down Root's reluctant throat quâ uniform Principles, and which provides a Joint Commission to which International disputes can be referred, would in my opinion be a national calamity.[158]

Laurier, noting that "the U.S. meet our views at every point", agreed that Bryce could now sign the treaty.[159] The Ambassador was informed forthwith and on the same day, January 11, 1909, the Treaty was signed by Elihu Root and James Bryce on behalf of their respective governments.[160]

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157. Governor General's Papers, No. 268, vol. 5(a), Despatch from Bryce to Lord Grey, Jan. 6, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 67-69, Despatch from Bryce to Lord Grey, Jan. 6, 1909, enclosing aide-mémoire; Telegram from Bryce to Lord Grey, Jan. 7, 1909.

158. Grey of Howick Papers, vol. 3, No. 001058-001059, Letter from Lord Grey to Laurier, Jan. 8, 1909.

159. Grey of Howick Papers, vol. 3, No. 001064, Letter from Laurier to Lord Grey, Jan. 11, 1909.

160. Governor General's Papers, No. 268, vol. 5(a), Telegram from Lord Grey to Lord Crewe, Jan. 10, 1909; Telegram from Lord Grey to Bryce, Jan. 11, 1909; Telegram from Bryce to Lord Grey, Jan. 11, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 70-71.

III RATIFICATION AND IMPLEMENTATION OF THE BOUNDARY WATERS TREATY

A. Advice and Consent of the United States Senate

The Boundary Waters Treaty was sent to the Senate immediately and that body referred it to its Foreign Relations Committee amid confident predictions that the treaty would receive swift and unanimous approval when the Committee met on January 20.[1]

The first and principal witness before the Foreign Relations Committee was Secretary Root in one of his final acts as Secretary of State. In a lengthy statement, he explained the reasons for entering into the treaty. He had proposed a treaty governing Niagara Falls. This was followed by his proposal to reach an agreement relating to irrigation on the prairies where each country was appropriating trans-boundary waters to the detriment of the other. Next, problems arose in relation to the waters of Lake Champlain, Rainy River and the St. Mary's River.

> . . . There were a number of other enterprises, points where questions arose, and it seemed as though all along the whole 3000 mile boundary, with these new developments of the use of water for power on the one hand and for irrigation on the other, it seemed as though the population were going to grab everything they could get, and we were going to be involved in a great multitude of disputes. We were actually in a number of them, and a cloud of others were arising before us.[2]

1. Governor General's Paper, No. 268, vol. 5(a), Despatch from Bryce to Lord Grey, Jan. 14, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 71-72.

2. U.S. Congress, Senate Committee on Foreign Relations. Treaty between the United States and Canada concerning boundary waters, signed at Washington, January 11, 1909. Hearing and proceedings, January-February, 1909, p. 269. (referred to hereafter as Foreign Relations Committee hearings); Other sources of this document: Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/64; Decimal File 1930-39, Department of State, National Archives, 711.42155/587; Anderson Papers, box 69; I.J.C., U.S. Sect. Library (bound volume); I.J.C., Can. Sect. File F-1-1; Griffin Memorandum, 1958, p. 7.

The existing diplomatic machinery for dealing with problems between Canada and the United States the Secretary described as cumbersome and frustrating.

> . . . It would take six months to get through each item, particularly if we had an ambassador here who didn't care anything about it [the problem at hand]. These people in London don't care anything about it--do it when they get time. Another incident to that situation is that Canada was never satisfied with anything that was done. The Canadians did not have to come up face to face themselves with the necessities of negotiation and to feel that it was necessary in order to get what they want to do what other people want--that mutual concessions and accommodation is essential to the conduct of business between nations, as it is between men. So they were always dissatisfied. They were continually finding fault with Great Britain and finding fault with us and looking with suspicion on everything that was done, suspecting that we were continually getting Great Britain to betray their interests.
>
> We have undertaken in this treaty, with the consent of Great Britain, to create a Commission which will enable Canada and ourselves to settle our own affairs to a very great degree without going through the long and serious circumlocution.[3]

Secretary Root then commented on some of the major terms of the treaty. Article II he felt was important in preserving the sovereign rights of each state while at the same time protecting injured parties by putting "people in one country in the relation to people in the other side as people in New York stand in relation to the people in Pennsylvania." The article would avoid the nations becoming embroiled in international questions, leaving their settlement to decisions of the domestic courts. Root was emphatic, in response to a question, that Article II had no application to tributaries of boundary waters. He was equally certain that Lake Michigan was neither a boundary water nor a tributary water under the treaty. With regard to Niagara Falls, Root explained the higher appropriation to Canada on the basis of the greater flow on the

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3. Foreign Relations Committee hearings, pp. 269-274. See footnote 2 for other sources.

Canadian side and the Chicago diversion. In its lack of interest for the preservation of the Falls, Root suggested Canada was much like the United States had been fifty or sixty years earlier. The Secretary then concluded his presentation.

> In other words, we take this machinery, having this practical tribunal created, we give them authority to pass on the waters, the use and disposition of the water; we provide that on the request of either Government they may be called upon to investigate and report, perform the functions of a master, and we provide that the tribunal may be used by the consent of both Governments for any other purpose.

The alternative

> . . . is continual irritation and hard feeling, and the irritation is greatest among the people of the weaker nations, and I have been very much surprised to find what intense feeling and what feeling and prejudice have been created about things on the Canadian side of the line that we would pay no attention to.[4]

Despite the convincing argument of the Secretary of State, several members of the Committee had reservations which they wished clarified before they would recommend the treaty for advice and consent of the Senate. Senator Lodge of Massachussetts proposed an amendment to Article VII which would require the consent of the Senate to appointment by the President of the United States commissioners. This proposal was at first accepted but later rejected by the Committee. Senators Nelson and Clapp of Minnesota and Heyburn of Idaho were concerned over the possible effects of Article II on projects undertaken on United States streams tributary to boundary waters. They wanted further clarification of the protective provisions of Article II.[5] Senator Nelson voiced three objections. Article II granted a right of action where none had previously existed. Article III precluded development on tributary streams without the consent of the United States Government and the commission. Article IV created a police power at the federal and international levels over water pollution. Each of these was an invasion of States'

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4. Foreign Relations Committee hearings, pp. 274-278. See footnote 2 for other sources.

5. Foreign Relations Committee hearings, pp. 281-283. See footnote 2 for other sources.

rights and there should be an amendment to the treaty preserving the rights of the States to deal with their waters.[6] The most serious objection to the treaty was raised by Senator Smith of Michigan who, though not a member of the Committee, was granted the privilege of stating his case before the Committee at a later day. He argued that the equal division of waters provision of Article VIII had the effect of interfering with the proprietary rights of Michigan citizens (power interests) in the St. Mary's River at Sault Ste. Marie (the Soo) where the flow of the boundary waters was greater on the United States side.[7] Concern was rising that the Senate might not so readily give its consent to the treaty.[8]

In the face of mounting opposition to various clauses of the treaty, Secretary Root called upon Anderson to prepare a rebuttal to the arguments of the Senators. Anderson made his statement before the Foreign Relations Committee on January 30 and February 3. He made the following points:

1. The distinctions drawn between boundary waters, boundary tributary waters and transboundary waters were fully preserved in Articles II and III.

2. Article II referred only to transboundary waters and water flowing into boundary waters. It did not include use, obstruction or diversion of boundary waters.

3. Article III had reference only to boundary waters.

4. Article IV (apart from the pollution provision) referred only to waters flowing from boundary waters and to transboundary rivers after they had passed the boundary.

5. The Commission was given jurisdiction under Article VIII over waters coming under Articles III and IV but not over waters coming under Article II.

6. The right of action under Article II applied to private or individual interests in distinction to public or governmental interests ("parties" versus "Parties") and the right of the parties was to enter the courts of

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6. Anderson Papers, box 69, Letter from Sen. K. Nelson to Chairman Sen. S.M. Cullom, Jan. 29, 1909.

7. Foreign Relations Committee hearings, pp. 281-283. See footnote 2 for other sources.

8. Governor General's Paper, No. 268, vol. 5(a), Despatch from Bryce to Lord Grey, Jan. 30, 1909.

the other country (jurisdiction) and sue under the law of that place for damages as if the injury had occurred there.

7. Articles II, III and IV had no application where special agreements were undertaken by the Parties.

8. Senator Nelson's concern over the effect of Articles II and III on the drainage of the Minnesota swamplands into tributaries of the Rainy River and the Lake of the Woods was unfounded. First, the case came under Article II (if, indeed, drainage could be considered a "diversion") and not Article III and hence did not require the approval of the Commission. Second, since the right to damages was limited to private parties and since Minnesota law provided no right to damages in such cases, there could be no action by injured Canadians in the Minnesota courts.

9. Senator Heyburn's fears over the effects of Articles II, IV and VIII were equally unfounded. The principles enunciated in Article VIII had application only to boundary waters and not to others. Article II had no application to Lake Michigan and even if it did, the Chicago diversion was expressly excluded under the "existing works" clause. The Commission had no jurisdiction over the water pollution clause and since that clause referred only to pollution on one side of the boundary having an adverse effect on the other, there would seldom be an occasion on which it could be invoked by either country. There was little possibility of pollution of boundary waters becoming a serious problem.

10. Senator Smith's proposed amendment to protect the greater use by American citizens of the boundary waters at Sault Ste. Marie was unnecessary since Article VIII provided for the greater use by one side, on the approval of the Commission, where the natural conditions favoured it. The equal use provision of Article VIII was reasonable and logical since the Treaty of 1871 defined the boundary throughout the boundary waters as the center of the lakes and rivers. In addition, it was important to note that Article VIII subordinated private uses (power) to public uses (sanitary, domestic and navigation).[9]

In addition to this elaborate explanation before the Committee, Anderson was seeking by letter to placate the concerned Senators[10] and to answer the unfounded allegation of

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9. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/64, Memorandum for Foreign Relations Committee of the Senate, (undated); Foreign Relations Committee hearings, pp. 284,285; Anderson Papers, box 69; I.J.C., U.S. Sect. Library (bound volume); I.J.C., Can. Sect. File F-1-1; Griffin Memorandum 1958, pp. 46-48.

10. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/99, Letter from Anderson to Sen. H.C. Lodge, Feb. 6, 1909; Anderson Papers, box 65, pp. 396-399.

Smith as to Anderson's financial interest in securing approval of the treaty.[11]

On February 15, Senator Smith was invited to state his case before the Committee for an amendment to the treaty providing for the protection of the riparian rights of Michigan citizens at the Soo. He pointed out that the flow of the St. Mary's River at the Soo was two-thirds on the Michigan side and one-third on the Ontario side. Thus, the "equal and similar rights" provision of Article VIII would divest the Michigan power companies of their "proprietary interests" in a part of the water flowing over Michigan territory. He also objected to passing over to an "international tribunal" power to decide "rights which presently are purely American". "Why turn a proposition over to a foreign state when you are absolutely supreme without the treaty?" His amendment would merely provide that uses of the boundary waters be determined on the basis of territorial ownership and would not affect Canadian ratification of the treaty. "It would [have] if I said so in so many words that we were to take three-fourths and they one-fourth. If we fixed on an arbitrary amount."[12]

The Canadians, however, were not to be beguiled so easily by the Senator from Michigan. This became readily apparent as Anderson and Root moved to modify the provisions of the treaty which had given rise to the opposition in the Senate committee. On February 1, Anderson sent the following telegram to Gibbons:

> Would amendment striking out pollution clause in Article four be acceptable. Local interests insist that water at Soo rapids be divided on basis of territorial ownership at that point -- would this be acceptable. Do you interpret Article two as giving right of action for damages resulting from increasing flow of tributary waters by drawing swamps into them. May have to ask for an exchange of notes stating official understanding that no action would lie in such case. Please treat inquiry as confidential and

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11. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/66, Letter from Anderson to Secretary R. Bacon, Feb. 10, 1909.

12. Foreign Relations Committee hearings, pp. 287-296, See footnote 2 for other sources.

telegraph answer here today.[13]

He also asked for a meeting with Gibbons at an early date.[14] Gibbons replied:

> Have no authority to consent to amendments. Never thought to interpret Article Two in way you suggest. Do not think it was so intended. That matter might be covered by note but do not think the Soo matter could be. Pollution clause ought to stay in but be only enforced in more serious cases.[15]

Gibbons transmitted Anderson's proposals to the Prime Minister noting that Article II was quite clear and a valuable provision and that an understanding concerning the application of the second article of the 1842 Treaty could be given by Canada without creating any problems. He insisted, however, that Laurier should not agree to the Soo amendment giving the United States users more than one-half of the water simply because they had more territory bordering on the river than Canada did. The pollution clause was not important but should be retained for application in extreme cases.[16] In a second letter the next day, he

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13. Gibbons Papers, vol. 3, fol. 7, Telegram from Anderson to Gibbons, Feb. 1, 1909; Anderson Papers, box 65, p. 391.

14. Anderson Papers, box 65, p. 392, Telegram from Anderson to Gibbons, Feb. 1, 1909.

15. Gibbons Papers, vol. 8, Letterbook No. 1, p.507, Telegram from Gibbons to Anderson (confidential), Feb. 1, 1909.

16. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 571-577, Letter from Gibbons to Laurier, Feb. 1, 1909. Note: It will be recalled that Anderson had raised the question in December of Canada giving an understanding in writing that Article II of the 1842 Treaty would no longer be invoked with the signing of this treaty. At that time Gibbons was evasive with Anderson and avoided mention of the matter to Laurier. In early January Anderson pressed Gibbons again. The reply was that he could get no concession from Laurier and in any case, would give his own assurance that the 1842 Treaty article would never be invoked. This was not enough for Anderson and he informed Gibbons that the Secretary of State was communicating to Bryce the fact that the U.S. Government would now refuse to recognize the rights Canada claimed under this article. Gibbons then indicated that he would try to deal with Laurier on the matter once again. "Our people are not as strong in the back as they ought to be at Ottawa." See: Anderson Papers, box 69 Telegram from Anderson to Gibbons, Jan. 9, 1909; Telegram from Gibbons to Anderson, Jan. 9, 1909; Telegram from Gibbons to Anderson, Jan. 10, 1909; Telegram from Anderson to Gibbons, Jan. 14, 1909; Telegram from Gibbons to Anderson, Jan. 16, 1909.

elaborated on the interpretation of Article II, noting the distinction which must be drawn between injury to public rights caused by an upstream diversion and an injury to private interests. He felt that Article II was completely in accord with the so-called Harmon Doctrine despite earlier United States views. He did not think it would be wise for him to go to Washington until the Senate had approved the treaty since he would otherwise be pressured for concessions.[17]

Laurier agreed with all points raised by Gibbons[18] save the question of the application of Article II of the Treaty of 1842. The Prime Minister had received word from Bryce that Root had indicated that following signing of the treaty he would now permit the Minnesota Power Company to proceed with diversions of the Rainy River tributaries.[19] Laurier now pointed out to Gibbons that he was not to make any agreement with Anderson concerning the non-application of the 1842 Treaty to these boundary waters, noting that he would sign nothing based upon any such understanding.[20] He asked Gibbons, at the request of Bryce,[21] to go to Washington to work out the existing problems.

Gibbons returned from Washington concerned over the apparent support in the Senate for the Smith "rider" concerning rights at the Soo but convinced that Canada must insist on equal division of boundary waters throughout.[22] Indeed, to Secretary Bacon he wired:

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17. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 571-577, Letter from Gibbons to Laurier, Feb. 2, 1909.

18. Laurier Papers, 1909, vol. 559, No. 151481, Letter from Laurier to Gibbons, Feb. 9, 1909.

19. Gibbons Papers, vol. 14, fol. 3, Letter from Root to Bryce, Jan. 11, 1909.

20. Laurier Papers, 1909, vol. 560, No. 151791, Letter from Laurier to Gibbons (private), Feb. 15, 1909; Gibbons Papers, vol. 3, fol 5

21. Laurier Papers, 1909, vol. 560, No. 151789-151790, Telegram from Bryce to Lord Grey (secret), Feb. 12, 1909.

22. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 608-610, Letter from Gibbons to Laurier, Feb. 17, 1909; Laurier Papers, 1909, vol. 560, No. 151938-151940.

> On reflection think any amendment to be avoided; the principal (sic) of equal division is the only fair one and must be maintained, otherwise endless confusion.[23]

He felt that, on the other hand, Laurier was being completely unreasonable in insisting on the application of the 1842 Treaty to the diversions in Minnesota and that this opposition, coupled with the Smith support, could kill the treaty in the Senate.[24] Laurier at this point remained adamant: there was going to be no "secret" agreement concerning the non-application of the 1842 provisions. Either Article II of the Webster-Ashburton Treaty was to be abandoned formally or it was to have application in appropriate cases.[25]

When it became apparent after Senator Smith's appearance before the Senate committee that advice and consent of the Senate without an amendment or interpretation of Article VIII and without protection of rights in Minnesota was unlikely, Secretary Bacon proposed an understanding to be approved by Canada

> . . . that nothing in this Treaty shall be construed as affecting or changing any existing territorial or riparian rights in the water, or rights of owners of lands under water on either side of the International Boundary at the rapids of St. Mary's River in the use of waters flowing over such lands, subject to requirements of navigation in boundary waters and of navigation canals; and further, that nothing in this Treaty shall be construed as interfering with drainage of wet swamps and overflowed lands into streams flowing into boundary waters, and that these interpretations will be mentioned in the ratification . . .

Bryce communicated the proposal to Canada, assuring the Government that Root agreed that the understanding changed nothing in the treaty and urging the Prime Minister to adopt the understanding

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23. Numerical File 1906-10, Department of State, National Archives vol. 484, 5934/65, Telegram from Gibbons to Bacon, Feb. 16,1909.

24. Laurier Papers, 1909, vol. 560, No. 151942-151944, Letter from Gibbons to Laurier (private), Feb. 18, 1909.

25. Laurier Papers, 1909, vol. 560, No. 151945, Letter from Laurier to Gibbons (private), Feb. 19, 1909, Gibbons Papers, vol. 3 fol. 5.

in order to save the treaty.[26] He urged Gibbons to go to Ottawa to convince the Prime Minister of the acceptability of the proposal.[27]

Bryce had Anderson send his interpretation of the amendment to Gibbons.

> The effect of interpretation is to leave undisturbed present legal rights on each side at the Rapids, subject to requirements of navigation. This has always been my understanding of the true intent and meaning.[28]

Gibbons disagreed.

> We entirely differ in understanding. The principle of equal divisions is fair. Was approved by Commission and intended to be provided for by treaty. Appreciate difficulty of situation but if you develop power at rapids, provision should be made for preserving our right to divert our share above.

He suggested postponement of any immediate action on the matter.[29] When Gibbons replied to Bryce that Root's proposal was not as modest as Secretary Bacon had indicated and that it would indeed take water from Canada at the Soo,[30] Bryce replied that Root felt Gibbons misunderstood the import of the "rider" and had better come to Washington immediately.[31] Gibbons agreed to go to "denounce the rider as dishonest" and to insist on a fifty-fifty division of the waters at Sault Ste. Marie.[32]

Lord Grey informed Bryce of the position in Ottawa concerning Article VIII.

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26. Grey of Howick Papers, vol. 9, No. 002307-002308, Despatch from Bryce to Lord Grey (secret), Feb. 20, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 83-84.

27. Gibbons Papers, vol. 6, fol. 4, Telegram from Bryce to Gibbons, Feb. 21, 1909.

28. Anderson Papers, box 65, p. 410, Telegram from Anderson to Gibbons, Feb. 23, 1909; box 69.

29. Anderson Papers, box 69, Telegram from Gibbons to Anderson, Feb. 23, 1909.

30. Confidential Prints, International Boundary Waters, vol. 1, p. 84, Telegram from Gibbons to Bryce (secret), Feb. 23, 1909.

31. Confidential Prints, International Boundary Waters, vol. 1, p. 85, Telegrams from Bryce to Gibbons and Lord Grey (secret), Feb. 24, 1909; Gibbons Papers, vol. 6, fol. 4.

32. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 616-617, Letter from Gibbons to Laurier, Feb. 24, 1909; Laurier Papers, 1909, vol. 562, No. 152407-152408.

> I do not think Sir Wilfrid Laurier is quite convinced by Gibbons' talk, but as Gibbons takes this strong attitude, Sir Wilfrid Laurier cannot act in defiance of the opinion of his expert.[33]

Even Bryce, despite his earlier assurance of the harmlessness of the proposed "rider", was now having doubts as to its import. He wrote to Lord Grey:

> Between ourselves, the last stages of the treaty were handled hurriedly, and some of the points less thoroughly scrutinized than should have been the case. Hence the difference of view between Gibbons and Anderson.[34]

On February 24, the Foreign Relations Committee reported the treaty to the Senate for advice and consent, subject to the addition of a "rider" preserving riparian rights on the St. Mary's River and securing the right to drain swamp lands in Minnesota.[35] Action was now imperative and Gibbons agreed to meet in New York with Root, Anderson, Bacon and Bryce to attempt to clarify the meaning of the "rider" in relation to the Soo. He pointed out, however, that Laurier was going to have to concede the Minnesota diversion issue.

> . . . That we should insist upon raising a contention which it is conceded we cannot enforce, seems to me not justified by any form of reasoning unless indeed it is desired to drop the treaty.

He reminded Laurier that they could drop Article II entirely if Laurier insisted, but if they retained it, then Laurier must be prepared to give an understanding regarding the 1842 Treaty.[36] At the same time, Bryce was asking Gibbons to be reasonable in his demands.

> From what you tell me, I am not sanguine that an arrangement can be made in time, but after all the trouble spent on this Treaty, we must try to give it every chance. Even if an agreement can't be

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33. Grey of Howick Papers, vol. 9, No. 002311-002312, Letter from Lord Grey to Bryce, Feb. 24, 1909.

34. Grey of Howick Papers, vol. 9, No. 002313-002315, Letters from Bryce to Lord Grey, Feb. 24, 1909.

35. Foreign Relations Committee hearings, p. 297. See footnote 2 for additional sources.

36. Laurier Papers, 1909, vol. 562, No. 152431-152434, Letter from Gibbons to Laurier, Feb. 25, 1909; Gibbons Papers, vol. 8, Letterbook No. 1, pp. 622A-624.

> reached now, I will not despair of saving the Treaty in the long run. The consequences of losing it would be serious.[37]

Following the meeting in New York on February 26, Gibbons informed Laurier that Root and Bacon would agree to add to the "rider" the following words:

> . . . without prejudice to the right of Canada to take within its own territory not exceeding one-half of the total amount of the waters flowing from Lake Superior in the St. Mary's River available for power purposes,

and that he, Gibbons, found this fully acceptable. He insisted that the resolution protecting swamp land drainage in Minnesota should be conceded.[38] Laurier replied, after consulting with Aylesworth, that the Canadian Government must adhere to its original position and, in any case, the matter was too important to settle by telegram.[39] Gibbons was annoyed and told Laurier that he was being unreasonable.

> Please don't have further hindrance. Minnesota people have right to drain their swamps into streams tributary to Rainy river. Concession amounts to nothing but is excuse to secure support their senators. R. acted splendidly.[40]

He pointed out that his fellow-members of the Waterways Commission agreed with him that neither the Smith "rider" nor the Minnesota provision caused any harm to Canada.[41] He explained the position of the Senators.

> They conceive that the Resolution does nothing more than take out of the operation of the Treaty riparian rights over the land water therein mentioned. It leaves untouched all other general provisions. . . including

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37. Gibbons Papers, vol. 3, fol. 6, Letter from Bryce to Gibbons, Feb. 25, 1909.

38. Laurier Papers, 1909, vol. 562, No. 152435-152438, Telegrams from Gibbons to Laurier, Feb. 26, 1909; Grey of Howick Papers, vol. 9, No. 002316, Letter from Bryce to Lord Grey, Feb. 26, 1909; Anderson Papers, box 69, Memo of New York Meeting, Feb. 26, 1909.

39. Laurier Papers, 1909, vol. 562, No. 152436-152439, Telegrams from Laurier to Gibbons, Feb. 26, 1909.

40. Laurier Papers, 1909, vol. 562, No. 152440, Telegram from Gibbons to Laurier, Feb. 27, 1909.

41. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/64, Memorandum by O.H. Ernst to Root on Sault Ste. Marie, Jan. 29, 1909; Anderson Papers, box 69.

> that contained in the words "equal and similar rights" in Article VIII. It is merely safeguarding of one particular private interest in certain land and the water flowing in its natural course over that land. . .[42]

Laurier, bending slightly, suggested that the new draft might be acceptable but he would have to consult with Aylesworth before he could agree.[43]

Lord Grey sought to encourage the Prime Minister, urging that "it would be better to lose the battle of the Sault than to lose the Treaty".[44] He was so optimistic that he informed Bryce that Canada would accept the "rider" as long as the clarification reached in New York was added.[45] He informed the Foreign Office that the last obstacle to acceptance of the treaty seemed to have been removed.[46] Later the same day, after a meeting with Gibbons, Laurier and Aylesworth, he had to note in a memorandum that the latter two were completely opposed to the "rider".[47] He advised Bryce to inform the Secretary of State to have the Senate proceed with the amendment trying to draft it in such a way as to make it palatable to Canada.[48] Gibbons reported to Anderson: "All right, put it through."[49]

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42. Laurier Papers, 1909, vol. 562, No. 152686-152687, Letter from Gibbons to Laurier, Feb. 28, 1909; Gibbons Papers, vol. 14, fol. 3, Memorandum by Gibbons on meeting with Bacon and Root, (undated).

43. Laurier Papers, 1909, vol. 562, No. 152442, Telegram from Laurier to Gibbons, Feb. 27, 1909.

44. Grey of Howick Papers, vol. 4, No. 001108, Letter from Lord Grey to Laurier, Mar. 1, 1909.

45. Governor General's Papers, No. 268, vol. 5(a) Telegram from Lord Grey to Bryce, Mar. 1, 1909.

46. Governor General's Papers, No. 268, vol. 5(a), Telegram from Lord Grey to Lord Crewe (secret and confidential), Mar. 1,1909.

47. Grey of Howick Papers, vol. 9, No. 002318-002320, Memorandum of meeting with Laurier, Gibbons and Aylesworth, Mar. 1, 1909.

48. Governor General's Papers, No. 268, vol. 5(a), Telegram from Lord Grey to Bryce, Mar. 2, 1909; Confidential Prints, International Boundary Waters, vol. 1, p. 88.

49. Anderson Papers, box 69, Telegram from Gibbons to Anderson, Mar. 1, 1909.

On March 2, Root sent Gibbons a note indicating that Senator Smith insisted on deleting the New York amendment to his "rider" and that it appeared most unlikely that anything else could be substituted before the Senate terminated its work on March 4.[50] Gibbons replied directly:

> Cannot get our people to accept without consideration. Think you had better let the treaty pass in best shape you can. Will try to get assent here later and think I can. A letter from the [new] Secretary of State to Mr. Bryce confirming interpretation as reserving our right to use of half the water would no doubt make it acceptable.[51]

On March 4, Bryce informed the Governor General that the treaty had been approved by the Senate along with the Smith "rider" and without the New York clarification.[52] He noted, however, that Root still felt that the meaning of the amendment was clear and did not deprive Canada of any rights. In addition, he noted, with the passage of the legislation by Congress expropriating the power interests at the Soo, Canada need have no worry since the land in question would then be owned by the United States Government and it would undoubtedly guarantee "equal and similar rights" under Article VIII.[53] Gibbons replied to the Ambassador that he thought Bryce could give his assurance that the Canadian Government would accept the treaty as long as it could get written statements from Senator Root and the Secretary of State assuring Canada that the "rider" meant

> . . . [t]hat each country reserves its right, within its own territory to take not exceeding one-half the

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50. Laurier Papers, 1909, vol. 566, No. 153653-153654, Note and Draft of Senate Resolution from Root to Gibbons, Mar. 2, 1909; Anderson Papers, box 69, Letter from Root to Bryce, Mar. 2, 1909

51. Gibbons Papers, vol. 3, fol. 7, Telegram from Gibbons to Root, Mar. 2, 1909; Anderson Papers, box 69.

52. Governor General's Papers, No. 268, vol. 5(a), Telegram from Bryce to Lord Grey, Mar. 4, 1909; Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/80A, Note from Bacon to Bryce, Mar. 5, 1909.

53. Grey of Howick Papers, vol. 9, No. 002322-002323, Letter from Bryce to Lord Grey, Mar. 4, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 89-91; Gibbons Papers, vol. 3, fol. 6, Letter from Bryce to Gibbons, Mar. 5, 1909.

quantity of the water flowing from Lake Superior into the St. Mary River and Sault Ste. Marie, over and above the needs of navigation.[54]

It was about this time that Senator Root prepared in longhand an extensive memorandum stating his impressions of the treaty.

1. Each country is now entitled to use all water flowing in its own territory.

2. Each country can construct in its own territory whatever works it wishes.

3. There is no right in either country or its citizens to restrain or interfere with the use of water on the other side of the boundary because of any effect upon riparian owners on its own side of the boundary below the point of construction.

4. The pending treaty declares a rule not before existing for the exercise of the rights above stated, viz: the rule of equal and similar use.

5. The Senate resolution creates no new rights but saves already existing rights of riparian owners at the Sault rapids from destruction or diminution by the treaty itself.

6. As without the treaty the riparian owners of one country have no right to interfere with the taking by the other country of any quantity of water by works in its own territory higher up the stream neither the treaty nor the resolution saves or creates any such right.

7. The riparian rights on the American side referred to in the resolution will not require any recognition from Canada and will not limit or affect action by Canada on the Canadian side of the St. Mary's River.

8. There will be no limitation upon Canada's taking in the Rapids all the water she can get by construction in her own territory.

9. The only limitation upon Canada's taking above the Rapids all the water she can get by construction in her own territory will be the rule of equal division prescribed by the treaty.

10. The rule of equal division will be equally binding upon the U.S. in any taking of water above the Rapids.

11. The U.S., taking above the Rapids, will be limited by the rights of riparian owners in U.S. downstream to prevent diversion in U.S. territory of water naturally flowing over their land.[55]

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54. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 628-629, Letter from Gibbons to Bryce, Mar. 4, 1909.

55. Anderson Papers, box 69, Memorandum written by Secretary Root, March, 1909, with reference to Boundary Waters Treaty Approved by Senate on March 3, 1909.

B. Approval of the Government of Canada

Action in Canada following the signing of the Treaty on January 11, 1909, was very much slower than in the United States. Not only did the Executive have yet to be convinced of its desirability, but the Prime Minister had to decide if and when the Treaty would be submitted to Parliament. Laurier explained the problems to Gibbons.

> . . . Aylesworth is of the opinion, as you stated to me, that it is preferable not to insert in the treaty a provision for its ratification by Parliament. This reasoning is strong, though he did not fully convince me, but my confidence in both of you combined is such that I yield.

With regard to Article II, he noted that the United States wanted to keep the provisions of that article "subject to existing treaties" and he felt this was of benefit to Canada since

> . . .[w]e will be able to make use of your argument about the treaty of 1842, bad as it was. I suspect that this (Article II) will be strongly objected to and attacked. I wish you were in the House of Commons to defend it, but you are not, and I write now to ask you to set down to work and to prepare me a brief for the discussions, which will not be very far off.
>
> Before I conclude, let me offer you my sincere gratitude for the labour, energy and bull work which you have given us for the last three years.[56]

Gibbons agreed to prepare a brief for Laurier covering Article II and other provisions, but he was dismayed with Laurier's intention to invoke the navigation protection of the Treaty of 1842 after Gibbons had assured the United States that in return for Article II, Canada would make no assertion of right under the earlier treaty provisions. In two letters he tried to convince Laurier that Article II obviated the need for invoking the 1842 Treaty since the commission would protect navigation interests affected by any Minnesota diversion.

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56. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons (confidential), Jan. 12, 1909.

> Public rights are not interfered with but left just as they were. Private rights are fully protected. Diversions are permitted in all civilized countries for the greater good, subject to indemnity to those injuriously affected.
>
> Our citizens are given exactly the same rights as citizens of Minnesota. What more can they ask? Without the treaty the right to divert would have been given without any such protection. As a matter of fact this protection will put an end to the Minnesota project. The conditions as to non-interference with navigation are of the most stringent character and if in addition they have to recognize the claims of Canadian private interests there will be no work done.
>
> ....
>
> There is no trick at all in Article 2. It is distinctly understood and was as good an arrangement as we could get and I am not at all certain it was not the very best arrangement and better than our original suggestion.
>
> Under Article 2 the private interests in Canada are now protected. Public interests were also provided for by the last paragraph, the law being left just as it was; but the American authorities pointed out that they were going to make the most stringent provisions, which they have done, for the protection of navigation interests.

He noted that he had warned Root that if permission were now granted to the Minnesota Power Company, such action would render the role of the commission futile .

> Kindly do not forget that you repeatedly assured me that the conditions existing were intolerable, -- that under them you must necessarily yield in every case -- that it was most desirable that principles should be adopted -- that a permanent board was essential to their enforcement -- and that a permanent board of reference was just what was desired.

Gibbons concluded by thanking Laurier for his expression of appreciation, noting wryly: "I would have thought from Mr. Pugsley's anxiety to claim the making of the treaty that he, at least was embued (sic) with its greatness."[57]

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57. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 538-543, Letters from Gibbons to Laurier (private), Jan. 13 and 16, 1909.

Laurier was dubious of the value of Article II and cautioned everyone to avoid any public utterance on the treaty which might indicate that the United States had come off better once again. Bryce gave him his assurance.

> . . . You need be under no apprehension as regards anything being said here to let it be thought that the U.S. has got a good bargain in the Boundary Waters Treaty. To my thinking, the advantages of the bargain are with Canada, and I do not think any influence weaker than Root's could have got the treaty through the Senate.
>
> ....
>
> As to Article II of the Treaty, I like yourself, was not satisfied and argued with Root in the earlier stages for mine. But it is nevertheless a very great gain over having nothing at all.[58]

To Gibbons, Laurier wrote that

> . . . I find that it is an excellent arrangement, with the exception of Article II. I am rather nervous about that article. The diversion of running water is against all principles of international law . . .. Vattel is very positive that running waters cannot be diverted to the detriment of the country into which they flow.
>
> You told me that the British and American authorities, on the contrary, proclaim with absolute certainty the sovereignty of the country through which the stream runs, whilst it is within its own boundaries. This is the point as to which I would like to be informed.[59]

While Gibbons searched for legal authority to substantiate the provisions of Article II, he tried to convince Laurier of the merits of the clause, regardless of what the international law might be.

> It would not be wise that either country should be absolutely precluded in that regard because some private interests in the other country would be affected, any more than they should be precluded because private interests in their own would be so affected. It is because private interests can be protected that these interferences of property rights are justified anywhere.
>
> The whole objection to such interferences is removed if the private interests affected in the foreign country are placed in exactly the same position as if they were in the country where the diversion takes place.

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58. Laurier Papers, 1909, vol. 556, No. 150717-150720, Letter from Bryce to Laurier (private), Jan. 20, 1909.

59. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons (private), Jan. 27, 1909.

> It would never do for either country to absolutely agree that no work should be permitted of injury to private interests in the other. As under the 14th Amendment to the American Constitution no rights of property can be interfered with without compensation, we are a good deal safer under this provision than they are. Unfortunately, under our constitution the Legislature can do anything it wants with other people's property.[60]

After obtaining from George Clinton a legal statement on the Harmon Doctrine as the accepted rule which excepted sovereign states from the same domestic law as riparian owners on the same stream and thus gave great value to Article II which clearly does "away with the right to exercise the sovereign power without furnishing redress to parties who may be injured",[61] Gibbons sent his opinion to Laurier.

> I found no established rule of International law which would protect private interests in one country injured by diversions in the other. I sought then to make one which was all to our advantage, and Mr. Bacon made the concession which we have in Article 2, and which everyone which I have consulted on the matter, save yourself, thinks is a first-class protection.
>
> I had, as I told you before, in getting this concession, to agree that we would not raise the exceedingly doubtful plea of the Treaty of 1842. There was no point in making an issue over that treaty whatever.
>
> . . . .
>
> Am I to understand you now as repudiating my arrangement? If so, of course, I must communicate it to the other side and that will end the treaty. Tremendous pressure has been brought on their side in opposition to this Article 2. The senators from Minnesota and Vermont all oppose it as inflicting an additional obligation on them which does not exist under present law.[62]

At the same time that the Prime Minister was trying to obtain reassurance for himself and his Cabinet that the treaty was good, he was faced with the first of a series of political

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60. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 563-564, Letter from Gibbons to Laurier, Jan. 28, 1909; Laurier Papers, 1909, vol. 557, No. 151106-151107.

61. Gibbons Papers, vol. 6, fol. 4, Letters from Clinton to Gibbons, Jan. 29 & 30,1909.

62. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 611-613, Letter from Gibbons to Laurier (private), Feb. 18, 1909.

storms in the House of Commons, with demands for tabling the treaty in the House at the same time that it was being discussed in executive session in the Senate of the United States. To quell the disquiet in the House and in the Canadian press, the Colonial Office issued a communiqué pointing out the peculiar role of the United States Senate in the treaty-making process and emphasizing the role of the Canadian Government in the making of the Boundary Waters Treaty.

> . . . It should, however, in the first place, be pointed out that this treaty was in effect drafted by an officer of the Canadian Government; that every amendment made in it was either made at the suggestion of, or was reported to and approved by that Government, and that therefore, the Dominion Government have the full text of the Treaty in their hands. The full text of the Treaty has not actually been received in the Colonial Office up to the present date. This fact is mentioned because the quotation from the Montreal "Star" in the "Times" of the 29th of January would seem to imply that in some way the Canadian Government had been ignored in the negotiations. This is, of course, not the case and the only point at issue is the fact that the Senate of the United States see the treaty before it is seen by the Parliament of Canada. Reference, indeed, is made in the "Times" to with-holding from "the Canadian Parliament or people a treaty given to the Senate and people of the United States"; but it is understood that the treaty has not been officially published in the United States, whether or not its contents have been allowed to leak out.

After explaining the treaty-making and treaty-implementing processes in the United States and the United Kingdom, the communiqué concluded:

> It will be seen, therefore, that the reason why the United States Senate sees a treaty before it is seen by the Parliament of Canada is not that there is any necessity for a treaty to be sent to Downing Street and returned hence, as apparently stated in the Canadian press and in the Dominion House of Commons, but because the Senate is a part of the treaty-making power under the constitution of the United States. No doubt the feeling of dissatisfaction in the House of Commons in Canada would be removed if this were known, and if it were clearly understood that every word of the treaty has been approved by the Canadian Government. From time to time in the Imperial

> House of Commons it has been represented that Parliament is entitled to be consulted before any treaty is ratified and in fact that Parliament should have an active share in the making of treaties; but these representations have never been given effect to and in this matter the relations between the Dominion Parliament and the Dominion Government is practically analogous to that between the Imperial Parliament and the Imperial Government.[63]

The Prime Minister reported the Colonial Office statement to the House on February 4, [64] but the press was not satisfied and continued demanding information; meanwhile criticizing the treaty in ignorance of the provisions.[65] When, on February 18, the full text of the treaty appeared prematurely in the United States papers, the pressure on the Canadian Government became acute. Laurier sent, confidentially, a copy of the treaty with explanations to the Leader of the Opposition.[66] He sent an urgent request to the Colonial Office for permission to table the treaty in the House[67] and enjoined Gibbons from speaking on the treaty before the Canadian Club until it had been officially communicated to the House.[68] The Foreign Office simply replied that "the United States Government deprecate publication until passed by the Senate".[69]

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63. Governor General's Papers, No. 268, vol. 5(a), Colonial Office Communiqué to the Press, Jan. 29, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 72-73; 79-80.

64. Confidential Prints, International Boundary Waters, vol. 1, p. 81, Telegram from Lord Grey to Colonial Secretary, Feb. 4, 1909.

65. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 594, 601-603, Letters from Gibbons to J.A. Macdonald, Editor, The Globe, Feb. 9 & 11, 1909.

66. Laurier Papers, 1909, vol. 561, No. 151987, Letter from Laurier to Borden (confidential), Feb. 18, 1909.

67. Governor General's Papers, No. 268, vol. 5(a), Telegram from Lord Grey to Lord Crewe, Feb. 18, 1909.

68. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons, Feb. 22, 1909.

69. Governor General's Papers, No. 268, vol. 5(a), Cable from Lord Crewe to Lord Grey, Feb. 22, 1909; Confidential Prints, International Boundary Waters, vol. 1, p. 84.

On top of the difficulties which the Prime Minister was having with his own feelings over the treaty and the ill-informed reactions of the Canadian public and press, the news reached Ottawa on March 4 that the United States Senate had given its advice and consent, subject to the inclusion of the Smith "rider" as originally drafted. As noted, Gibbons moved quickly to forestall the added ire which he knew this development would arouse in Sir Wilfrid and his Government. His request for an official opinion from Secretary of State Philander Knox stating that the interpretation of the amendment would not be harmful to Canada was greeted with reluctance. "He did not consider that such an assurance would be binding on his successors, and . . . the Senate would resent what would . . . amount to an agreement made without their consent."[70] Bryce did, however, obtain from Senator Root a "purely personal" opinion which he sent to Ottawa.

> . . . [T]he Senate resolution merely takes out of the operation of the Waterways Treaty the riparian rights and rights incident to the ownership of land under water therein mentioned, leaving the provisions of the Treaty operative except as they would interfere with those rights of ownership. This, of course, leaves the "equal and similar rights" provision in Article VIII binding upon both Governments so far as the exercise of those rights of ownership is not involved.
>
> If the United States should acquire the rights of present riparian owners it would, I suppose, take the same right now preserved to the present owners, but could not go beyond them except under the limitations of the Treaty.

To this, Bryce added that Root had also stated that in his view there was no right in a riparian owner of land to the natural flow of the stream over or past that land.[71]

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70. Confidential Prints, International Boundary Waters, vol. 1, pp. 91-92, Despatch from Bryce to Lord Grey, Mar. 5, 1909.

71. Confidential Prints, International Boundary Waters, vol. 1, pp. 95-96, Despatch from Bryce to Lord Grey, Mar. 10, 1909, enclosing memorandum of conversation with Root and letter from Root to Bryce; Gibbons Papers, vol. 14, fol. 3, Copy of Letter from Root to Bryce, Mar. 8, 1909.

The British Ambassador, the Governor General and Gibbons all sought to bring pressure to bear on the Canadian Government to accept the treaty even with the "rider".[72] Mitchell Innes, British chargé d'affaires in Washington, indicated, however, that the new Secretary of State was not happy with the amendment and might be willing to re-introduce the treaty to the new Senate without the "rider".[73] Gibbons wrote to the Minister of Justice urging quick acceptance of the treaty as it stood.

> If the treaty is rejected, what have we got? Certainly our rights are not less under the treaty than they would be without it. If the principle is right for which we contend as a matter of international law, then we run the risk in accepting the amendment. If there is no established principle then we have the benefit of the provision in Article 8, and the benefit of Mr. Root's moral support which to my mind is all important.
>
> I am prepared anywhere and at any time to defend the treaty and justify myself against all the world and to get ninety-nine out of a hundred to agree with me.[74]

The Prime Minister was not appeased and felt that his only recourse at this point was to table the treaty and all related correspondence in the House at the earliest moment. In requesting the necessary permission from the Colonial Office he urged the British Government not to recommend ratification of the treaty to His Majesty until it had been fully discussed in the Canadian Parliament and the views of the Canadian Government communicated to London.[75] Permission and reassurance were forthcoming from London immediately[76] as was permission from

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72. Grey of Howick Papers, vol. 9, No. 002330, Letter from Lord Grey to Bryce, Mar. 8, 1909; No. 002334, Letter from Bryce to Lord Grey, Mar. 8, 1909.

73. Gibbons Papers, vol. 3, fol. 6, Letter from Innes to Gibbons, Mar. 10, 1909.

74. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 630-633, Letter from Gibbons to Aylesworth, Mar. 8,1909.

75. Governor General's Papers, No. 268, vol. 5(a), Telegram from Lord Grey to Lord Crewe, Mar. 10, 1909.

76. Governor General's Papers, No. 268, vol. 5(a), Telegram from Lord Crewe to Lord Grey, Mar. 11, 1909; Telegram from Lord Crewe to Lord Grey, Mar. 12, 1909; Telegram from Lord Grey to Lord Crewe, Mar. 12, 1909; Confidential Prints, International Boundary Waters, vol. 1, p. 97.

Washington to table certain correspondence with the exception of Root's opinion on the Smith amendment.[77] Laurier then informed Gibbons of his intention and instructed him to find out what the practical effect of the Smith "rider" would be in Canada.[78]

Gibbons replied to Laurier that he was trying to get an official statement from the United States Government which accorded with the views of Root as to the meaning of the "rider" and if he were successful, Canada could accept the amendment without any fears for, in his view, there was nothing in the treaty which indicated that the United States was entitled to more water than Canada. He cautioned Laurier against accepting any views that Canada was entitled to anything less than one-half of the waters at the Soo.[79] He subsequently obtained a legal opinion from a Toronto law firm and armed with this, he and Aylesworth proceeded to Washington to meet with Root, Anderson, Knox and Attorney General Wickersham to attempt to obtain a consensus on the meaning of the "rider".[80]

Gibbons returned from Washington to report that Anderson would persuade the Attorney General to release for Canadian use an opinion on the effect of the Smith "rider" which he had prepared for the Secretary of War.[81] Wickersham agreed to

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77. Governor General's Papers, No. 268, vol. 5(a), Despatch from Innes to Lord Grey, Mar. 23, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 97-100.

78. Gibbons Papers, vol. 6, fol. 4, Letter from Laurier to Gibbons (private), Mar. 13, 1909; Laurier Papers, 1909, vol. 565, No. 153248.

79. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 637-638, Letter from Gibbons to Laurier, Mar. 12, 1909; pp. 640-644, Letter from Gibbons to Laurier, Mar. 15, 1909; Laurier Papers, 1909, vol. 565, No. 153246-153247; No. 153250-153255; vol. 566, No. 153651-153652, Letter from Gibbons to Laurier, Mar. 17, 1909.

80. Laurier Papers, 1909, vol. 567, No. 153991-153994, Letter from Gibbons to Laurier, Mar. 24, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 98-99, Telegram from Innes to Lord Grey, Mar. 24, 1909.

81. Laurier Papers, 1909, vol. 570, No. 154752-154753, Letter from Gibbons to Laurier, Apr 14, 1909.

Anderson's request.[82] The opinion was sent to the Governor General on April 14.

> The net effect of this resolution, therefore, would seem to be that a riparian owner of land on either side of the river at the rapids, retains precisely the rights in and to such lands and the waters flowing over or along such lands which he would have independently of the Treaty; those rights being (and recognized by the Treaty as being) subject to the requirements of navigation, and to the paramount right of each of the respective nations to use the water in its own territory . . . . The rights of riparian owners below the rapids on the American side of the water thus preserved can have no relation to the taking of water by Canada on her own side of the river above the rapids. The only limitation upon Canada taking above the rapids all the water she can get by construction in her own territory is the rule of equal division established by the Treaty.
>
> It follows, therefore, that the principle of equality of use established by the Treaty applies both above and below the rapids. The reservation by the resolution of existing rights at the rapids does not affect or disturb the application of such principle above or below the rapids as the rights of riparian proprietors on either side of the boundary have no relation to the use of waters on the other side. The taking of water above the rapids on the American side of the boundary will, however, be subject to the rights of the American riparian owners below, to prevent diversions in American territory of water naturally flowing over their land.

In any case, the Attorney General concluded, once the United States Government expropriated the power interests at the Soo,

> . . . there will be no riparian rights in the water and no rights of owners of lands under water which will fall within the protection of the resolution above quoted, and the provisions of the Treaty will then become fully operative over the waters at the rapids in a like manner, as is provided with respect to the

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82. Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/83-84, Letter from Wickersham to Bacon, Apr. 10, 1909, enclosing opinion; Anderson Papers, box 65, pp. 444-445, Letter from Anderson to Wickersham, Apr. 8, 1909.

other waterways falling within the general provisions of the Treaty.[83]

Although the Governor General rejoiced once more over this "final settlement"[84] and Gibbons assured everyone that there could now be no doubt that the Senate resolution was harmless to Canada,[85] Laurier expressed nothing but confusion over the explanations given by Wickersham and Gibbons of the "rider", and added that he could not agree with their views.

> Neither do I agree with the conclusion of your letter that the whole Treaty is a generous concession on the part of the United States. I do not think so. There are in it valuable concessions which have been made to us by the United States and there are other concessions made by us of equal importance. I have not come to any conclusion, but if I were to follow my own inclination at the present time, we would decline the Treaty. Article II has always seemed to me a very serious source of trouble, but in view of the other concessions I have been disposed to accept. The black eye which has been given us on the St. Mary's River puts another face altogether on the matter.[86]

To the House he indicated that his Government had reached no decision on the acceptance or rejection of the Smith "rider".[87] To Bryce, the Prime Minister was little kinder. Pointing out to him that the amendment was anything but "meaningless", as

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83. Laurier Papers, 1909, vol. 734, No. 206041-206048, Letter from Lord Grey to Laurier, Apr. 17, 1909; Gibbons Papers, vol. 14, fol. 3, Opinion of Attorney General Wickersham to Bryce, (undated); Governor General's Papers, No. 268, vol 5(b) Despatch from Bryce to Lord Grey, Apr. 14, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp.100-103; Anderson Papers, box 69.

84. Gibbons Papers, vol. 6, fol. 4, Letter from Lord Grey to Gibbons, Apr. 17, 1909.

85. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 671-672, Letter from Gibbons to Lord Grey (strictly private), Apr. 19, 1909; p. 670, Letter from Gibbons to Bryce (strictly private), Apr. 19, 1909.

86. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons (private), Apr. 20, 1909; Laurier Papers, 1909;vol. 570, No. 154754-154755.

87. Canada, Parliament, House of Commons Debates, 11th Parliament, 1st Session, vol. 3, p. 4471, Apr 19, 1909.

suggested by Bryce,[88] he added: "turn it in any way we may, it comes to this: that it nullifies the provisions of Article III insofar as the rapids of the St. Mary's River are concerned." He concluded, that quite apart from the amendment, he was still reluctant to accept Article II and he was not sure that Council was about to accept the treaty.[89]

On April 23 Gibbons submitted to the Prime Minister and the Minister of Justice a comprehensive brief on the treaty, prepared at the behest of Aylesworth.[90] In it he sought to substantiate every provision of the treaty, with particular attention to Articles II and IX and the Senate amendment. Citing Harmon, Oppenheim and Phillimore, he concluded that there was no authority which limited the absolute sovereignty of a state within its territory and hence, all another state could do was seek to protect its citizens against injury.

> . . . It certainly cannot ask that its citizens, with respect to their private rights, shall have a greater protection than is given to riparian interests similarly affected in the country where the diversion takes place; nor would it be politic that either country should agree to an absolute prohibition of its rights to diversions which might be of great advantage solely because some private interests in another country might be injuriously affected.
>
> Without the provisions of this treaty, the private interests in the one country injured by diversions on the other would be without any remedy. The treaty practically removes the boundary line in dealing with these interests .... The citizens of a foreign country can demand no higher rights than those of the State or Province where the diversion is made. They are given the same rights under the provisions of this Treaty.
>
> ....
>
> Article IX is a step in advance of anything previously attempted in the way of providing for the settlement

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88. Laurier Papers, 1909, vol. 572, No. 155291, Letter from Bryce to Laurier, Apr. 26, 1909.

89. Laurier Papers, 1909, vol. 572, No. 155292-155294, Letter from Laurier to Bryce, Apr. 28, 1909.

90. Gibbons Papers, vol. 6, fol. 4, Letter from Aylesworth to Gibbons, Apr. 16, 1909.

> of international disputes. Its importance cannot be over-estimated. In it the Commissioners are half Canadian and half appointed by the United States. To this Board either nation may demand that any matter of dispute arising along the frontier may be referred. The Board are to have the powers of a Court with full facilities for getting at the truth with regard to matters referred to them. The Board is permanent in its character and its members are not appointed for the special purpose of accomplishing certain results; on the contrary, they are sworn to faithfully and impartially perform the duties imposed upon them.
>
> ....
>
> . . . After the disputants have threshed the matter out before such a Court and a report has been furnished to the respective Governments with findings upon the facts and advice as to the action that shall be taken, there will be little room left for international complications.
>
> ....

As to the Senate resolution, it was clear, said Gibbons, that Canada was not precluded from taking her half of the water above the rapids at the Soo. "The Treaty does not do anything more than preserve . . . 'precisely the rights which these riparian owners would have independently of the treaty.'" The opinions of Senator Root and Attorney General Wickersham were "quite in accordance with the principles of international law, which I have always insisted upon . . ."[91]

When Aylesworth promised to submit Gibbons' brief to the Cabinet, optimism among the proponents of the treaty rose again.[92] But it was shortlived once more, for Laurier reverted to all of his old objections, fearing the hostile reaction of Parliament and the public to the provisions of Article II and the Senate resolution.[93] His fears were fortified when he received a telegram from the Premier of Ontario

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91. Gibbons Papers, vol. 14, fol. 3, Brief as to Waterways Treaty, Apr. 23, 1909; Laurier Papers, 1909, vol. 570, No. 154756-154773; I.J.C., Can. Sect. File F-1-1, vol. 6.

92. Gibbons Papers, vol. 6, fol. 4, Letter from Aylesworth to Gibbons, Apr. 26, 1909; Letter from Bryce to Gibbons (private) Apr. 28, 1909.

93. Grey of Howick Papers, vol. 9, No. 002410, Letter from Bryce to Lord Grey, May 1, 1909; No. 002411-002415, Letter from Lord Grey to Bryce, May 3, 1909.

indicating strong opposition to the amendment on the part of the Ontario Government.[94]

The Governor General decided to try once more to convince the Prime Minister that the Senate resolution was innocuous. He wrote to Bryce asking for a clarifying statement on the matter.

> Sir Wilfrid still adheres to the position, that he gave up most reluctantly the right of protest against a diversion of waters. He thinks that the Americans are less likely to divert their waters to our loss when they have to face a protest from a friendly neighbour, than they will be if they feel that they have the right to divert waters on paying compensation to Canadian interests adversely affected. He has been consistently uneasy on the subject of Article II ever since Gibbons made the concession. He can only defend this concession so he says, by showing he has secured as a result, the right to half of the surplus water in the boundary waters, and is very indignant at having made a concession against his will, to obtain a certain result, he should not be deprived of the full benefit of that concession.
>
> ....
>
> I had formed the opinion that Sir Wilfrid Laurier was only marking time until Parliament prorogued, but my last talks with him have caused me to fear that he is seriously contemplating the refusal on the part of the Government of Canada, to accept the treaty with the Senate Resolution. He thinks the dignity of Canada, and the hope of conducting future negotiations with the United States on fair and equal terms, require a protest, even at the risk of losing the Treaty.[95]

Bryce responded with a lengthy memorandum dealing with the import of the Smith "rider". He concluded with an interesting paragraph on a matter which was to raise serious problems many years later.

> As regards the rest of the Treaty, you are already well aware how many troubles might arise all along the International Boundary regarding the use of water in case the

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94. Laurier Papers, 1909, vol. 574, No. 155937, Telegram from Whitney to Laurier, May 12, 1909.

95. Grey of Howick Papers, vol. 9, No. 002433-002434, Letter from Lord Grey to Lord Bryce, May 17, 1909, No. 002439-002443, Letter from Lord Grey to Bryce, May 18, 1909.

> Treaty were to fall through. There would again be a fight over the Milk River and the St. Mary's River up in Montana and Alberta, and one cannot say how many other fights in other places. No doubt it is a pity that Article 2, which relates to waters crossing the boundary from one country to the other, has not been so worked out as to provide for the settlement of all questions that might arise upon certain fixed principles by the International Commission, or some other authority. But at present there is no international law whatever upon the subject, and although the Treaty does not go so far as we could wish, still, in providing that there should be a claim for compensation, it goes farther than the existing law and therefore on this point represents a distinct advance. I may mention that I had lately a conversation on the subject with Mr. Chandler Anderson, who, as you know, took a large part in drafting the Treaty, along with Mr. Gibbons. When I referred to Article 2, he joined in my regret that it did not go farther, and said that he had always hoped that the subject of waters crossing the boundary would be worked out further and that principles would be laid down applicable to it. He still hoped that this might be done by the help of the International Commission, if the Treaty were ratified. Meeting Mr. Secretary Knox two or three days afterwards, I raised the subject with him and asked him whether he did not think that it would be desirable to try to work out these principles as Mr. Anderson suggested. Mr. Knox said that he saw no objection to that course. I should hope, therefore, if the Treaty is ratified, that one of the first things that we might set the Commission to do would be to work out these principles. We should then not only render a great service to Canada and the United States, but should make a great and novel contribution to international law.[96]

The Governor General communicated these views to Laurier along with the assurances of Root and Knox that the real purpose of the Smith amendment was "to increase the value of the Power Company's riparian rights, not as against Canada, but as against the United States Government, so as to compel them to pay more when they proceed to acquire them compulsorily as they are about to do". He further noted that the opinion from

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96. Laurier Papers, 1909, vol. 734, No. 206145-206150, Memorandum from Bryce to Lord Grey, May 18, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 106-107.

the Attorney General was official and would be followed by the United States Government.[97]

On May 27 the Minister of Justice prepared for the consideration of the Cabinet a confidential memorandum on the treaty, based largely on the earlier memorandum prepared by Gibbons for the Minister. He felt that the provisions of Article II were entirely consistent with "the dignity of any independent sovereign State" and that "any obligation there may be upon the upstream country not to interfere with the natural flow must be a mere matter of comity between nations." Article III, in his view, had application as well to the Chicago diversion since that diversion could not be classed as an "ordinary" diversion for sanitary purposes. Article V showed Canada's readiness to cooperate with the United States in preserving the scenic beauty of the Falls and the provision could be abrogated later if necessary for increased power production. Article VIII was so important that a failure to ratify the treaty would result in a loss "probably impossible for anyone adequately to realize at the present time." Article IX was essential for fair play and harmony all along the border and Article X created a "minature Hague Tribunal" which would keep the Imperial Government from having to intervene in North American disputes.

> Upon a mature consideration of the whole Treaty, as signed by the Plenipotentiaries, I would strongly urge its acceptance as a fair and just international agreement in which the interests of Canada have been kept in view and are honourably conserved.

As to the Senate resolution, the Minister was convinced, after reading the opinions of the United States officials and making his own assessment of it, that it did not detract from the benefits

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97. Grey of Howick Papers, vol. 4, No. 001206-001207, Despatch from Bryce to Lord Grey, May 19, 1909; Governor General's Papers, No. 268, vol. 5(b), Telegram from Bryce to Lord Grey, May 19, 1909; Laurier Papers, 1909, vol. 734, No. 206137-206143, Letter from Lord Grey to Laurier, May 20, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 108-111 (including Memorandum from Governor General to the Privy Council, May 21, 1909.)

received by Canada under the treaty and therefore, should not preclude acceptance of the treaty by Canada.[98]

While Laurier was trying to digest and analyse the advice coming to him from these many sources, he was being urged by one of his Senators first, to submit the treaty to Parliament for formal ratification and not mere approval and, secondly, to defer action on the whole thing for a couple of years to see if some of the more objectionable features might be removed.[99] The Prime Minister was not moved by these suggestions.[100]

The Prime Minister was also under attack in the House. In the first full-scale offensive by the Opposition against the treaty, Magrath suggested that the provisions were "selling Canada down the river". Several Conservative members urged rejection of the treaty on the basis of the "rider" provisions. Borden felt that several parts of the treaty were probably outside of the powers of the Parliament to implement. To all the critics, Laurier replied that the provisions of the treaty were excellent; as for the "rider", this might preclude acceptance of the treaty by Canada.[101]

Gibbons, perhaps showing some doubt in his own mind, wrote again to Clinton at the end of June asking for a formal legal opinion on Article II, wondering if there were authorities supporting the assertion of sovereign rights.[102] At the same

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98. Laurier Papers, 1909, vol. 565, No. 153256-153262, Memorandum of the Minister of Justice on Proposed Treaty between Great Britain and the United States Regarding Waters between United States and Canada, May 27, 1909; Confidential Prints, International Boundary Waters, vol. 1, pp. 111-117; I.J.C., Can. Sect. File F-1-1, vol. 6.

99. Laurier Papers, 1909, vol. 570, No. 154715, Letter from Senator Ross to Laurier, Apr. 13, 1909; vol. 579, No. 157062-157070, Letter from Senator Ross to Laurier, June 17, 1909; vol. 580 No. 157214, Letter from Senator Ross to Laurier, June 24, 1909.

100. Laurier Papers, 1909, vol. 570, No. 154716, Letter from Laurier to Senator Ross, Apr. 14, 1909.

101. Canada, Parliament, House of Commons Debates, 11th Parliament, 1st Session, vol. 4, pp. 6583-6624; 6630-6650, May 14, 1909.

102. Gibbons Papers, vol. 8, Letterbook No. 1, p. 565, Letter from Gibbons to Clinton (confidential), June 28, 1909.

time he wrote to Anderson, assuring him that the Canadian Government would accept the treaty as soon as the Cabinet resumed its sessions in the autumn, although it found the Smith amendment bothersome.[103]

At the end of July, Gibbons reported to the Prime Minister that Anderson was proceeding with the acquisition of the Chandler-Dunbar (power company) property in the St. Mary's River for the United States Government and consequently, as Gibbons optimistically believed, this resolved all Canadian opposition to the treaty.[104] Laurier replied that his concern now was not with the "rider" but with Article II and particularly with Article VI and that he was awaiting advice on these points from "experts". He was not at all sure that Article VI gave Canada what it was entitled to.[105]

The "expert" was George C. Anderson, a consulting engineer of Denver, Colorado who submitted his report in mid-September. He described Article VI as "greatly unjust to the interests of Canada" for six reasons.

1. Equal apportionment ignored geographical factors and was beneficial to the United States only.
2. Equal apportionment ignored Canada's prior rights to St. Mary water in Canada.
3. No provision was made for periodic division of the waters.
4. Canada received no compensation for use by the United States of the Milk River channel in Canada to convey irrigation waters.
5. Canada received no compensation for maintaining the Milk River channel for the United States.
6. The Commission was defective since no impartial arbitrator was provided for and no guidance was

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103. Gibbons Papers, vol. 3, fol. 7, Letter from Gibbons to Anderson, June 30, 1909; vol. 8, Letterbook No. 1, p. 714, Letter from Gibbons to Anderson (confidential), July 2, 1909; Anderson Papers, box 69.

104. Gibbons Papers, vol.8, Letterbook No. 1, p. 718, Letter from Gibbons to Laurier (private), July 31, 1909.

105. Gibbons Papers, vol. 6, fol. 4, Letter from Laurier to Gibbons, July 30, 1909.

given for carrying out the task under Article VI.[106]

The Anderson report was turned over to Dr. W.F. King who shortly submitted a report to the Minister of Public Works, refuting at every point the arguments advanced by Anderson. He felt that as there was no international law defining equitable apportionment, equal apportionment was equitable apportionment. Canada got a more consistent supply of irrigation water by the agreement than she would get under prior rights on the St. Mary. Periodic divisions of the waters would be made by the commission under general principles laid down by that body and there would be no need for reference to arbitration; agreement would be reached by negotiation. As to payments to Canada by the United States, there was no such need if the United States was willing to provide storage of waters needed by Canada. He raised some doubt as to this, but concluded that Canada would be better off with her own storage facilities and noted that the Canadian Pacific Railway, owner of the irrigation operation in Alberta agreed with this view.[107] The memorandum of Dr. King was supported by a general memorandum prepared at the same time by Louis Costé, a Canadian member of the Waterways Commission who suggested that Canada had everything to gain and nothing to lose since otherwise there was nothing to stop the United States diverting the entire flow of both rivers.[108]

The Prime Minister decided, on the basis of these conflicting reports, to send Mr. Pugsley, the Minister of Public Works, and Dr. King to Washington to confer with Chandler

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106. Canada, Sessional Paper No. 19e, Correspondence and Documents relating to St. Mary and Milk Rivers, 1910, Report on Treaty relating to Boundary Waters and Questions Arising along the Boundary between Canada and the United States, Sept 19, 1909.

107. Canada, Sessional Paper No. 19e, Correspondence and Documents relating to St. Mary and Milk Rivers 1910, Memorandum upon Mr. George C. Anderson's Report, dated 18th September, 1909, upon Article VI of the International Waterways Treaty (undated).

108. I.J.C. Can. Sect. File F-1-1, vol. 4, Memorandum by Louis Costé for the Minister of Public Works, September, 1909.

Anderson on the meaning of Article VI and on the prospects of the United States building storage facilities on the upper St. Mary River which would benefit Canada.[109] It was felt that another "rider" might be necessary to clarify the meaning of Article VI.[110]

Following the conference in Washington, the British Ambassador wrote to indicate that he had received assurance from Anderson that the United States was prepared to proceed with the construction of a reservoir on the upper reaches of the St. Mary River.[111] This was subsequently reiterated by the Secretary of State.

> . . .[I]t is the definite intention of this Government to proceed with the storage works on the St. Mary's and Milk Rivers, the construction of which the Dominion Government regard as essential for securing the Canadian interests in a due supply of water in that part of the Milk River which passes through Canadian territory.

The United States Government declined the Canadian offer to pay one half of the cost of construction on grounds that Congress had already appropriated ample funds to cover the cost.[112]

The Minister of Public Works concluded, however, that the reservoir to be built by the United States was not to serve the purpose desired by Canada (to provide a regulated supply of water down the St. Mary River to Canada) but only to facilitate the diversion of the St. Mary waters in Montana into the Milk River channel for the benefit of the United States territory. He would accept the United States proposal

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109. Grey of Howick Papers, vol. 9, No. 002488-002491, Letter from Lord Grey to Bryce, Nov. 12, 1909.

110. Canada, Sessional Paper No. 19e, Correspondence and Documents relating to St. Mary and Milk Rivers 1910, Memorandum from Dr. King to Pugsley, Nov. 15, 1909.

111. Governor General's Papers, No. 268, vol. 5(b), Despatch from Bryce to Lord Grey, Dec. 15, 1909.

112. Governor General's Papers, No. 268, vol. 5(b), Despatch from Bryce to Lord Grey, Jan. 4, 1910; Grey of Howick Papers, vol. 9, No. 002550-002552, Letter from Bryce to Lord Grey, Jan. 1, 1910; Confidential Prints, International Boundary Waters, vol. 1, pp. 118-122.

only if assurance was given that the storage in Montana would be for the benefit of the flows of both the Milk and the St. Mary.[113]

Meanwhile, in response to a query in the House as to the status of the treaty, the Prime Minister replied that subsidiary negotiations were in progress "to enable his Government to reach a judgment on one of the points at issue."[114]

The Prime Minister asked the Governor General to seek the necessary assurance from the Secretary of State who at that moment was reviewing the status of the treaty.[115] After a second conference in Washington, it became evident that the United States would not provide the additional storage in Montana requested by Canada. The Secretary of State pointed out that he was informed by the Department of the Interior that it was physically impossible to build a reservoir of sufficient capacity to provide as well for Canadian needs. In addition, he noted that

> . . .[a]n examination of [Article VI] will show that it provides merely for an equal division between the two countries of the waters of the St. Mary's and Milk rivers, with certain prior appropriations of the natural flow apportioned to each side. There is no requirement that the United States shall store any waters for the use of Canada, in fact no mention is made of the storage of waters, and the waters which the United States proposes to store are to be taken from its half share of the natural flow and are intended for use on its own side of the boundary. The proposed storage of waters, therefore, by the United States will in no way diminish or interfere with the half share of the natural flow to which Canada is entitled under the Treaty.

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113. Governor General's Papers, No. 268, vol. 5(b), Letter from Pugsley to Laurier, Jan. 20, 1910; Confidential Prints, International Boundary Waters, vol. 1, pp. 122-123.

114. Canada, Parliament, House of Commons Debates, 11th Parliament, 2d Session, vol. 1, p. 1802, Jan. 13, 1910.

115. Governor General's Papers, No. 268, vol. 5(b), Letter from Laurier to Lord Grey, Jan. 21, 1910; Numerical File 1906-10, Department of State, National Archives, vol. 484, 5934/97, Memorandum on Status of Waterways Treaty, Jan. 26, 1910.

> . . . It further appears . . . that on the Canadian side of the boundary the natural conditions are more favorable for the storage of Canada's share of the water at less cost and with greater assurance of permanence and safety than at the outlet of St. Mary's Lake, where the works to be constructed by the United States must be located.[116]

The Prime Minister was most displeased with this attitude and combined with the current hostility in the United States over the tariff concessions granted by Canada to France, he felt that it might be best to let the treaty fall.[117] Gibbons, discussing with him the matter of power development at Cornwall, an issue presently before the Waterways Commission, took the opportunity to remind Laurier of the problems in the absence of a treaty.

> If the treaty were in force, we would be in a perfectly safe position at Long Sault. The treaty provides that there shall be no diversion without the consent of the Commission, and then that there shall be equal apportionment as between the two countries. Without the treaty, if the interests of navigation are not interfered with, (and the American members of the Commission think they will be greatly improved), there is no power that I know of to prevent the Americans doing as they please in their own territory, and, unfortunately for us, at this particular point the great flow of water is on their side, a very small proportion being on ours. I see that Mr. Sifton said at Brantford that he is going to see (among other things) that we get our half. Unless the treaty goes through, I think he will have his hands full carrying out his contract. The Americans will do just as they please within their own territory.[118]

Laurier informed the House that he hoped to make an announcement soon in relation to the treaty[119] and instructed

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116. Governor General's Papers, No. 268, vol. 5(b), Telegram from Bryce to Lord Grey, Jan. 31, 1910; Despatch from Bryce to Lord Grey, Feb. 10, 1910; Grey of Howick Papers, vol. 4, No. 001309-001310, Letter from Lord Grey to Laurier, Jan. 31, 1910; No. 001320, Letter from Lord Grey to Laurier, Feb. 12, 1910; Confidential Prints, International Boundary Waters, vol. 1, pp.123-127.

117. Grey of Howick Papers, vol. 10, No. 002630, Letter from Lord Grey to Bryce, Mar. 18, 1910.

118. Laurier Papers, 1910, vol. 617, No. 167693-167696, Letter from Gibbons to Laurier, Mar. 2, 1910.

119. Canada, Parliament, House of Commons Debates, 11th Parliament, 2d Session, vol. 3, p. 4403, Mar. 1, 1910.

the Minister of Public Works to obtain from the C.P.R. a statement of its views on Article VI in face of the United States refusal to provide storage facilities for Canadian water. Following a favourable report from the President of the railway that Article VI was thoroughly equitable "and amply protects our interests in as far as they are concerned with the Alberta Railway and Irrigation Company",[120] the Prime Minister finally authorized the Governor General to provide for the exchange of letters of ratification[121] and announced to Parliament on March 30 that, in view of the ratification of the treaty, all documents and relevant correspondence would be tabled in the House forthwith.[122] Bryce informed the Secretary of State of Laurier's decision, observing that

> . . . the Treaty is one which appears eminently calculated to benefit both our countries not only by settling a number of questions which it is desirable to remove from the sphere of possible controversy and by providing for the settlement of other questions which may arise hereafter, but also by facilitating the use and development of streams valuable both for navigation, for power and for the generation of power.[123]

Knox agreed that the treaty seemed "to be one of those fortunate international arrangements which is equally advantageous to both parties . . ."[124]

While the approval for and the preparation of ratifications was following the circuitous route from Ottawa to

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120. Canada, Sessional Paper No. 19e, Correspondence and Documents relating to St. Mary and Milk Rivers 1910, Letter from Shaughnessy to Pugsley, Mar. 4, 1910.

121. Governor General's Papers, No. 268, vol. 5(b), Letter from Lord Grey to Bryce, Mar. 8, 1910; Telegram from Bryce to Lord Grey, Mar. 28, 1910; Confidential Prints, International Boundary Waters, vol. 1, p. 127, Letter from Laurier to Lord Grey, Mar. 25, 1910.

122. Canada, Parliament, House of Commons Debates, 11th Parliament, 2d Session, vol. 4, p. 5932, Mar. 30, 1910.

123. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/103, Note from Bryce to Knox, Mar. 29,1910.

124. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/103, Note from Knox to Bryce, Mar. 30, 1910.

Washington to London and back again, Bryce reminded the Secretary of State and the Canadian Government of the need under Article XII to provide the necessary legislation. The Secretary of State agreed to have the legislation introduced in the present session of Congress. The Canadian Cabinet felt, however, that the present session was too far advanced to act and suggested that during the recess concurrent legislation might be prepared by the two Governments to be introduced in the autumn.[125] Mr. Knox replied that under the two constitutions it appeared that different legislation might be required in each country and, therefore, his Government would proceed immediately to introduce the enabling legislation in the United States Congress.[126]

The instruments of ratification were exchanged between Knox and Bryce in Washington on May 5, 1910[127] and Root and Gibbons were able to congratulate each other on a task finally done. Said Gibbons:

> . . . For the first time it puts into practice the principle which you have so strongly approved -- a judicial forum to deal with international matters. I can only trust that it will be the forerunner of others.[128]

And Root replied:

> I think you are to be especially congratulated on the ratification of the International Commission treaty. The making of the treaty and its ratification are largely due to your personal ability and force of character, and I think that you have rendered a very great service to your home country and to the United States as well. The public has no adequate

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125. Governor General's Papers, No. 268, vol. 5(b), Telegram from Lord Grey to Lord Crewe, Apr. 5, 1910; Cable from Lord Crewe to Lord Grey, Apr. 6, 1910; Despatch from Lord Crewe to Lord Grey, Apr. 12, 1910.

126. Governor General's Papers, No. 268, vol. 5(b), Despatch from Bryce to Lord Grey, Apr. 15, 1910; Privy Council Minute 778, April 26, 1910; Confidential Prints, International Boundary Waters, vol. 1, pp. 128-131.

127. Governor General's Papers, No. 268, vol. 5(b), Despatch from Bryce to Lord Grey, May 5, 1910; Confidential Prints, International Boundary Waters, vol. 1, pp. 131-132.

128. Gibbons Papers, vol. 8, Letterbook No. 1, p. 822, Letter from Gibbons to Root, Apr. 1, 1910.

> conception of the tremendous scope and importance of the thing which has been done as a preventative of controversy in the future. The time will come, however, when this will be recognized.[129]

Others, including Anderson himself, thought that the State Department adviser should be given greater credit for the treaty. The Assistant Secretary wired his congratulations and thanks from Paris. A prominent Washington lawyer, offering his congratulations, observed:

> . . . I do not think credit is always extended in the right direction, and that in a certain circle there does not seem to have been credit enough to go around . . .

To which Anderson replied:

> . . . You will be interested to know that Mr. Root always referred to this treaty as the "Anderson-Gibbons Treaty", and I have always said to him that to that title should be added "by and with the advice and consent of Secretary Root." On the other hand I was much interested, but not altogether surprised, to learn from Warren the other day that in Canada Mr. Gibbons is receiving entire credit for it. As a matter of fact the original treaty was prepared by me without consultation with Mr. Gibbons, and after being submitted to Mr. Root was forwarded to Gibbons without change. Since then the only changes which were made in it were in phraseology, in the omission of one article, and in the addition of another article . . .[130]

The State Department in a press release emphasized the importance of the treaty and suggested the active role which the Commission would play as the populations and uses of waters along the boundary increased. The problems were ones which could be dealt with adequately by neither country acting alone -- they required action by mutual agreement. Of Article IX, the release observed:

> . . . Either country, therefore, may call upon this Commission acting jointly, or upon its own section

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129. Gibbons Papers, vol. 3, fol.7, Letter from Root to Gibbons, May 16, 1910.

130. Anderson Papers, box 69, Telegram from Bacon to Anderson, May 6, 1910, Letter from C.H. Butler to Anderson, May 7, 1910; Letter from Anderson to Butler, May 9, 1910.

> of the Commission acting separately, to examine into and report upon any question or matter of difference arising between them along their common frontier . . . There are now pending between the two countries many such questions, some of them of long standing and many more will necessarily arise in the future, all of which, under the provisions of this treaty, may appropriately be referred to this Commission for examination and report . . . Although the reports of the Commission on questions so referred are not in themselves binding upon either country, they will inevitably exercise a strong influence upon the ultimate settlement of such questions; and even if the Commissioners are not entirely in accord in the conclusions reached, their reports will at least furnish a common fund of information which will be of immense assistance in reaching a final adjustment by diplomatic negotiations.[131]

C. Implementation of the Treaty by Congress

On May 23 Secretary Knox reported to the President the importance of enacting legislation to give effect to the Boundary Waters Treaty. He recommended on the basis of a memorandum from Anderson, legislation providing for the appointment of three commissioners, a secretary and clerical staff and compensation therefor, and necessary funds for the operation of the United States section plus the payment of one-half of the expenses of the Commission, not to exceed seventy-five thousand dollars. He also recommended legislation to implement provisions of Article XII.[132] The President transmitted the request to Congress with a draft bill.[133] The bill was referred directly to the Senate Committee on Foreign Relations where it was subjected to some

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131. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/109, State Department Press Release, May 5, 1910.

132. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/122, Memorandum from Anderson to Knox, May 14, 1910; Anderson Papers, box 69; Confidential Prints, International Boundary Waters, vol. 1, p. 133, Letter from Knox to Taft, May 23, 1910.

133. Governor General's Papers, No. 268, vol. 5(b), Despatch from Bryce to Lord Grey, June 3, 1910, Confidential Prints, International Boundary Waters, vol. 1, pp. 132-133, Message from President Taft to Senate and House of Representatives, May 24, 1910; Congressional Record, 61st Congress, 2d Session, 1909-1910, vol. 45, part 7, p. 6773.

amendments before it was reported back to the Senate on June 1.[134] One amendment was concerned with the imposition of additional duties on the members of the United States section.[135] As approved by the Senate, the bill provided that the United States section might "perform such other duties of like or similar kind as they may be called upon to perform under the direction of the Secretary of State . . .", that the commissioners should be appointed by the President with the advice and consent of the Senate, that the Secretary should be appointed by the Secretary of State and that the appropriated funds should be expended under the direction of the Secretary of State.[136]

In the House of Representatives, the bill ran into considerable opposition on many of its points. Particularly, objections were raised to the imposition of additional duties on the commissioners and the requirement that their appointments be confirmed by the Senate. No compromise appeared possible and eventually the bill expired, the only legislation bringing the Commission in to existence in the United States being the appropriation enactment of June 25, 1910.[137]

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134. Congressional Record, 61st Congress, 2d Session, 1909-1910, vol. 45, part 7, p. 6771; Decimal File 1910-29, Department of State, National Archives, Box 6601, 711.42155/115, Memorandum from Knox to Rep. J.S. Fassett, June 13, 1910.

135. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/115, Memorandum from Knox to Rep. J.S. Fassett, June 13, 1910.

136. Congressional Record, 61st Congress 3d Session, 1910-1911, vol. 46, part 1, pp. 491-492; Confidential Prints, International Boundary Waters, vol. 1, p. 134.

137. Congressional Record, 61st Congress, 3d Session, 1910-1911, vol. 46, part 1, pp. 491-492; Sundry Civil Appropriation Act, June 25, 1910, 36 Stat. 384.

D. Implementation of the Treaty by Parliament

With the Canadian Parliament in recess for the summer, nothing could be done to expedite matters in Canada. In July, Bryce reminded the Canadian Government that the President was most anxious to appoint the United States commissioners and wanted to know when the Canadian Government would be prepared to do likewise.[138] In November the Prime Minister was asked when he proposed to reply to the July request.[139] Pope replied that there was no communication from the Prime Minister on the matter.[140]

On December 6, 1910 the Minister of Public Works submitted to the House of Commons a resolution on a bill relating to the "Establishment and Expenses of the International Joint Commission under the Boundary Waters Treaty", giving the Canadian Parliament its first real opportunity to discuss the treaty.[141] In the ensuing debate on the resolution, the opposition members took full advantage of the opportunity to expand upon the doubts which they had expressed earlier as to the value of the treaty and the worst fears of the Prime Minister were confirmed when the Government was called upon to explain and defend Articles II and VI. So protracted was the opposition to the treaty that it was not until May of 1911 that the bill was given third and final reading.

The Minister of Public Works led off the debate with a defensive analysis of Article II. With reference to the right of diversion under the first paragraph, he said that

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138. Governor General's Papers, No. 268, vol. 5(b), Despatch from Bryce to the Administrator, July 16, 1910.

139. Governor General's Papers, No. 268, vol. 5(b), Letter from the Governor General's Secretary to Pope, Nov. 3, 1910.

140. Governor General's Papers, No. 268, vol. 5(b), Letter from Pope to Governor General's Secretary, Nov. 4, 1910.

141. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, p. 867, Dec. 6, 1910.

> . . . that is simply an affirmance of what has always been contended by the United States to be international law, and of what I do not think has been disputed by the jurists of this country, that is to say that so far as the waters which are wholly situate within the country are concerned, that country may make a diversion of these waters and prevent them from flowing into boundary waters.

After explaining the evolution of the Harmon Doctrine in the United States, the Minister drew the attention of the House to the final paragraph of Article II noting that in

> . . . all future cases the citizens of either country are placed in exactly the same position as a riparian proprietor lower down the stream would be placed in regard to any diversion of water by a private riparian owner further up the stream by which his rights would be interfered with. In other words, both nations, by the latter clause of this article, making provision for the recognition and payment by the country whose subject caused the injury, recognize that there would be the same obligation to make payment for that injury as if it was a question between citizens of the same country.[142]

The Leader of the Opposition, Robert Borden, found neither of these contentions plausible.

> If the Minister's statement could be added as a rider to the treaty it would make it very plain, but there is nothing in the treaty to that effect. On the contrary, there is a direct statement that the United States reserves absolute jurisdiction and control over that very thing, and therefore can pass such a statute as I have alluded to without apparently infringing the terms of this treaty, rather in accordance with its very terms. Then the citizen would not have in the United States the same rights as he would have if the diversion had taken place in Alberta. Therefore I do not think that you could work out the provision of the treaty in the way the Minister suggests.
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> . . . .
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> I am not so sure as the Minister is that it is a recognized principle of international law that one country

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142. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 869-871, Dec. 6, 1910; Griffin Memorandum, 1958, pp. 48-49.

> or its citizens under its law can divert a stream that runs into an adjoining country. I have always had it in mind, although I have not looked carefully into the question, that the general rule of international law was quite the reverse of that.[143]

Mr. Pugsley pointed to the Allegash-Penobscot diversion by the United States as an example of recognition by Canada of the Harmon Doctrine. As he understood the compensation provision of the second paragraph, it placed an obligation on the two federal governments, so that even if a State or Province made no provision in its law for compensation, "it would be the duty of both countries . . . to make provision for the payment of any damages." Mr. Borden felt that while this was an excellent principle, the right to compensation might prove completely illusory in practice.[144]

Mr. Magrath pursued his Leader's line of questioning, asking the Minister of Public Works if, indeed, the treaty would preclude a State from authorizing a diversion of water flowing through it without providing for compensation of injured parties in Canada. Mr. Pugsley insisted that this was his understanding of the constitutional position in the United States: "the spirit of the treaty" is to give "an absolutely new right to subjects of the two countries." He hastened to add, however, that this did not mean that the rights of the provinces were in any way affected in relation to their control over water resources. A province could still authorize the diversion in its jurisdiction of waters flowing across the international boundary. What the treaty did was to enable injured parties on the other side to complain to their federal government, who in turn would take the matter up with the other federal government "to see that compensation is provided for the injury, and vice versa, the same obligation that is imposed upon the people of the United

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143. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 871-872, Dec. 6, 1910; Griffin Memorandum, 1958, p. 49.

144. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 872-874, Dec. 6, 1910; Griffin Memorandum, 1958. pp. 49-50.

States is also imposed upon the people of Canada."[145]

While the Minister was discussing Articles III, IV, V and VI, the Leader of the Opposition was searching the law books for authorities in relation to Article II. When the Minister concluded his statement on Article VI, noting that in the absence of this provision, the United States would have every right to divert the flows of the St. Mary and Milk Rivers before they entered Canada, Mr. Borden asked him once again to justify his statement in international law. Mr. Borden said that international law forbade the diversion of trans-boundary waters where there was interference with navigation, and although he had found no authority, he was convinced that this rule applied to interferences with other uses as well. The Minister referred him to "a very valuable opinion" given by United States Attorney General Harmon in 1895 in which it was made clear that, except for navigation purposes, no nation could claim a right to preclude another from using water in its territory in whatever manner it wished. Mr. Borden replied:

> I do not know what argument might have been made by the Attorney General of the United States. I would pay as much respect to that as the reasoning contained in it would demand, but I would not regard the argument of the Attorney General of the United States, made with respect to a matter in controversy between his own government and the government of Mexico, as absolutely conclusive of the international law upon this subject . . . I do not feel myself bound at all by the opinion of the Attorney General of the United States making an argument for the interest of his own country. . .

The Minister merely replied that in his view a diversion

> . . . would be an act of discourtesy which would be greater or less depending upon the extent of the waters which were diverted, but it would not be a casus belli. It would not be a ground upon which the government would feel warranted in taking hostile action against the government which authorized such a diversion to take place.[146]

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145. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 875-880, Dec. 6, 1910; Griffin Memorandum, 1958, p. 50.

146. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 893-896, Dec. 6, 1910; Griffin Memorandum, 1958, pp. 51-53.

By the time the Minister of Public Works had completed his statement on the treaty, the Leader of the Opposition had laid his hands upon a copy of Oppenheim's International Law, and he launched a full attack upon Article II.

> If the writer of this book had intended to use language absolutely descriptive of the very point we are debating now he could not have used any more apt for that purpose. It seems to me that the Minister of Public Works and the government must have been altogether too much influenced by the opinion of the Attorney General of the United States . . . and must have accepted as a thoroughly reliable statement of international law what was, after all, only an argument made by the Attorney General of the United States in opposition to a claim for damages from Mexico. I would be inclined to think that the government in entering into this treaty have had a wrong impression as to the international law on this subject. The Minister of Public Works took pains to state that the rule of international law as he understood it was embodied in the terms of this treaty except that a right of action was provided. It would appear that international law is not embodied in the terms of this treaty, that a very different principle is laid down and recognized by this treaty, one for which my hon. friend says the United States has made contention in the past . . . I think that my hon. friend the Minister of Public Works has not made good his position or the position of the government; he has merely made it apparent to the House that the government, in entering into this treaty, have done so with not very much regard to international law . . .

The Minister lamely replied that the Harmon Doctrine was more than a mere statement of the Attorney General; "it was the deliberate action of the government of the United States." Mr. Borden must remember that

> . . . it was the settled determination of the United States to maintain the sovereign right to do as they pleased with the waters of their own country, except so far as it might interfere with navigation in the neighbouring country.

The Opposition leader took this to mean that Canada allowed the United States to dictate what international law should be and demanded to know if the government, like the Minister of Public Works, accepted the United States' view of international law. Mr. Pugsley grew more confused and confusing.

> No, the treaty is not framed on that theory. I was presenting that view as a reason why this treaty might be regarded even as more satisfactory than one might regard it simply having reference to its terms, and if one were to take that view of international rights and obligations. What I said before, and what I say now, is that, apart altogether from the question of the right of either country to divert water, this provision under Article VI is eminently fair to both countries because it provides, in respect of both these streams which take their rise in the United States and pass through Canadian territory, that the water shall be equally divided between the two countries . . . So altogether, apart from the question of international rights, this treaty affords us, so far as the St. Mary's and Milk rivers are concerned, provisions eminently fair and calculated to do complete justice to the people of the two countries. I move the adoption of the resolution.

Mr. Borden was not letting the Minister off so lightly and wished to discuss the very point which Pugsley was putting aside, Article II. He again accused the government of entering the treaty in ignorance of international law as it related to diversion of transboundary and tributary waters.[147]

The Minister of Justice, realizing that to continue the line of argument espoused by Pugsley would be to put the government in an untenable position, decided to place the plain facts before the House.

> . . . The question which had to be considered as a practical question, in coming to a conclusion on that point, was, whether or not we were better off with such an international arrangement as this is, than we would be without any at all. It is all very well for the learned leader of the opposition to cite us the opinion of a very well known text writer, stating that a nation is not allowed to divert a river which crosses the boundary between its territory and that of another nation, if such diversion will injure property the territory of the downstream nation. That is a very good principle; it is exactly the principle of law which would be enforced as between an upstream riparian owner, who was seeking to divert, and a downstream riparian owner, who was to be hurt by it,

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147. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 903-907, Dec. 6, 1910; Griffin Memorandum, 1958, pp. 53-55

> if the two properties were in the same country. But how are you going to enforce such a provision of international law -- if it be a settled principle of international law -- when the property injured is in a different country from that in which the diversion takes place?

He explained that Canada had contended for this common law rule to be included in the treaty as recommended by the Waterways Commission but that Mr. Root had rejected outright such a proposal. Noting that he would have been much happier with the common law rule than with the one included in the treaty, he went on:

> . . . But when you are making a bargain of any kind, whether it be an international treaty or a compromise between two individuals, you have got to get the best terms you can secure, and frequently you have to compromise, and do a considerable amount of give and take. Now, we could not induce the representatives of the United States in this matter to go the length we would like to go, the length of declaring the principle of common law that water flows and ought to be allowed to flow. But we have induced them to go a considerable distance.

After explaining the compensation provision of Article II in some detail Aylesworth concluded:

> . . . I fully concede, as I have said, that if we could have got the right to prevent diversions . . . I would have been personally better pleased, and would have thought that it was more fully carrying out the principle of the common law. But unable to get that, we have got certainly the next best thing, and a very great advance upon nothing at all, because if there had been no treaty you could not have prevented the United States doing these very same things. It is all very well to cite Oppenheim to them, but what do they care for Oppenheim when there is no court to enforce the rules of law he lays down? You could not have any redress short of an agreement to go to the Hague. The utmost we could do would be to expostulate, to complain, to grumble, to protest, and what good would it have done us? I think, taking a practical view of the situation, that it was wiser to take what we could get than to refuse and get anything (sic) at all.[148]

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148. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 908-910; Dec 6, 1910, Griffin Memorandum, 1958, pp. 55-56.

Mr. Borden was unimpressed.

> . . . I would not be inclined exactly to accept the view which the Minister of Justice puts forward, namely that when an attitude is taken by the United States in disregard of accepted authorities on international law, we are obliged to recognize that as a sound position simply because if we do not, nothing will be left to us but to expostulate.

However, he did not pursue his contention that the provisions of Article II were unacceptable and Sir Wilfrid Laurier took the opportunity to conclude discussion of Article II.

> . . . I may say that it was only after careful and exhaustive consideration on my part that I agreed to accept the treaty as it has been written. I would have regarded the international law as my hon. friend opposite does, that is to say, that the same principle should prevail in international law as prevails in the common law and the civil law, namely, that a man may make such use as he pleases of the water which flows over his property so long as he does not do so to the detriment of anybody else. But we were in this position, that whilst there are authorities in Europe which contend for that view, there are men on this continent who contend for the other view . . .What were we to do? They might [follow their view] , and if they did so, they might do it to our injury and we had no recourse whatever . . . . It seems to me that any man who reflects upon the condition of things that we had to deal with must agree that the course we took was the proper course. I, for my part, have always believed that the Americans are very good and very fair neighbours, but they always stand for their own view of things and in this matter they did. They said: This is international law and we do not admit any other interpretation than this one. It was no use to argue with them. We might have quoted Vattel and a number of the other writers that we know of, but it would have no effect. Therefore, we took this course under the circumstances and said: Very well, if you insist upon your view of it we want our law the same as your law and the consequences will be the same on either side.[149]

Charles Magrath from Medicine Hat was the chief opposition critic of the provisions of the treaty dealing with irrigation on the prairies. He pointed out on December 6, 1910 that he felt the provisions of Article VI were completely unfair

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149. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 911-912, Dec. 6, 1910; Griffin Memorandum, 1958, pp. 56-57

to Canada but he waited until the debate on the bill in May to make his major denunciation.[150] His criticism centered about the fact that Article VI had been drafted and accepted without consultation of persons who were knowledgeable of the conditions in Alberta. In his view, there should have been no special provision made for the Milk and St. Mary Rivers; they should have been left to be governed by the provisions of Article II where Canadian farmers could have obtained damages in the Montana courts when the United States diverted the waters. Under Article VI, he contended, Canada had given the United States a right to waters without any compensation to the injured interests in Alberta. He accused the Government of misleading the House by informing it in May of the past year that the United States would provide storage facilities for the waters of the St. Mary River used in Canada.[151]

The Minister of the Interior, Frank Oliver, replied that Canada's choice under Article VI was between one-half of the waters and no waters at all since the United States possessed the power to divert both streams before they entered Canada. He admitted that, as with Article II, the provisions under Article VI were not completely favourable, but the best that Canada could get.[152] Pugsley seconded this statement and added that, after all, the Canadian Pacific Railway was satisfied with the bargain.[153]

After discussion of various other features of the treaty, first reading was given to the bill. As originally drafted, it did little more than provide for the appointment

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150. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, pp. 897-899, Dec. 6, 1910.

151. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 5, pp. 9101-9122, May 16, 1911.

152. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 5, pp. 9123-9127, May 16, 1911.

153. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 5, pp. 9139-9156, May 16, 1911.

and payment of the commissioners, the payment of other expenses as authorized by the Minister of Public Works and the authority for the Commission to employ such personnel as might be necessary.[154] Following suggestions from the Governor General's Secretary and officers of the Justice Department,[155] the bill introduced for second reading on May 16, 1911 was in a substantially different form.[156] Section one confirmed and sanctioned the whole of the Treaty of 1909. Section two amended as necessary the laws of Canada and of the provinces to comply with the treaty obligations. Section three provided the grounds under Article II whereby a remedy existed for injury caused by diversion of transboundary and waters flowing into boundary waters. Section four vested jurisdiction in the Exchequer Court for claims made by United States citizens under Article II. Section five gave the Commission in Canada power to compel witnesses to appear before it. Section six empowered the Governor in Council to appropriate seventy-five thousand dollars per annum for expenses of the Commission and section seven set the maximum salaries at seventy-five hundred dollars for the commissioners and three thousand dollars for the secretary.[157]

After the bill was explained by Pugsley, several objections were raised by opposition members. It was argued that section one provided for ratification of the treaty by Parliament but this had already been done by the King. The Minister of Justice explained that section one was not ratification but to put on the statutes all provisions of the treaty so that

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154. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 1, p. 923, Dec. 6, 1910.

155. Governor General's Papers, No. 268, vol. 6(a) Memorandum from Malcolm to Newcombe, Apr. 15, 1911; Letter from Newcombe to Malcolm, Apr. 21, 1911; Letter from Newcombe to Malcolm, May 10, 1911.

156. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 5, p. 9091, May 16, 1911.

157. Confidential Prints, International Boundary Waters, vol. 1, pp. 182-183, Bill No. 36, as amended.

they became the laws of Canada. It was contended that in allowing the United States citizens access to the Exchequer Court rather than to the provincial courts, they were being placed in a more favourable position than Canadian citizens who must use the provincial court. Section three was criticized for amending wholesale the provincial laws without any consultation with the provincial governments.[158] These objections went largely unanswered and the bill was given third reading on May 16 and sent to the Senate.[159]

On May 19, 1911 the bill passed through the Senate after a desultory and uninformed encounter between Sir Richard Cartwright and Sir MacKenzie Bowell. Sir MacKenzie suggested that there had been some amendment to the treaty in the United States Senate.

> Sir Richard: There was something of that kind. We rather objected to the amendment, but it was a question of allowing it to pass or losing the treaty altogether.
>
> Sir MacKenzie: I thought it affected the rights of fishermen in Lake Erie and Huron.
>
> Sir Richard: I think it had more to say to the fishing part than anything else. An amendment was brought in by Senator Stone, which was finally incorporated in the treaty as we now have it.[160]

The bill received Royal Assent on the same day and thus became law at about the same time as the United States Congress was enacting the second annual appropriation for the United States section of the Commission.[161]

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158. Canada, Parliament, House of Commons Debates, Session 1910-1911, vol. 5, pp. 9091-9219, May 16, 1911.

159. Governor General's Papers, No. 268, vol. 6(a), Despatch from Lord Grey to Bryce, May 18, 1911.

160. Canada, Parliament, Senate Debates, Session 1910-1911 pp. 733-735, May 19, 1911.

161. Governor General's Papers, No. 268, vol. 6(a), Despatch from Innes to Lord Grey, Apr. 21, 1911; Despatch from Lord Grey to Bryce, June 1, 1911; Confidential Prints, International Boundary Waters, vol. 1, pp. 179-184.

E. Creation of the United States Section

The United States Government was anxious to establish the Commission and shortly after the first appropriation for the Commission was made, the Department of State urged the President to make the necessary appointments, noting that under the treaty the President was free to name the commissioners without reference to the Senate since the legislation which would have required such consent had failed to pass the House of Representatives.[162]

An inquiry was made as to the Canadian Government's readiness to make its appointments and,[163] after a lengthy period of no reply, another note was sent in December, pointing out that the President was under increasing pressure to make the appointments.[164] Discovering that there was little likelihood of the Canadian appointments being made at an early date, the Secretary of State advised the President to proceed with naming the commissioners.[165]

Following another slight delay during which the House of Representatives briefly reconsidered the legislation which had been introduced in June of the previous year and again failed to enact it,[166] the President, after a final inquiry as to the readiness of the Canadian Government,[167] informed the Secretary

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162. Decimal File 1910-29, Department of State, National Archives box 6601, 711.42155/118, Memorandum from State Department Solicitor to White House, July 14, 1910.

163. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/116A, Telegram from Acting Secretary of State to Bryce, July 15, 1910; Confidential Prints, International Boundary Waters, vol. 1, p.135.

164. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/127, Letter from Taft to Knox, Dec. 24, 1910.

165. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/127, Letter from Knox to Taft, Dec. 31, 1910.

166. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/132, Letter from Knox to Taft, Jan. 4, 1911.

167. Governor General's Papers, No. 268, vol. 6(a), Telegram from Bryce to Lord Grey, Mar. 11, 1911.

of State that he would appoint Thomas H. Carter of Montana, J.A. Tawney of Minnesota and Frank S. Streeter of New Hampshire with salaries of seventy-five hundred dollars, the maximum allowed under the appropriation legislation.[168] The Secretary in turn informed the British Ambassador.[169]

Before the Canadian Government completed the establishment of its section of the Commission, however, Carter had died, and in early December, the President named George Turner of Washington State to replace him.[170]

F. Creation of the Canadian Section

The appointment of the members of the Canadian section of the Commission was delayed first by confusion as to the mode of appointment and, second, by the change in administrations which occurred in late September, 1911. Gibbons was asked as early as February to serve as Canadian chairman but no appointment could be made until the legislation implementing the treaty had been enacted.[171]

The Government finally acted in August, informing the Governor General of the selection of George Gibbons of Ontario, A.P. Barnhill of New Brunswick and Aimé Geoffrion of Quebec as Canadian commissioners and requesting that the British Foreign Office be so informed in order that the commissions might be signed by the King.[172] While this procedure was correct,

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168. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/141, Letter from Taft to Knox, Mar. 9, 1911.

169. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/141, Letter from Knox to Bryce, Mar. 11, 1911.

170. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/173, Letter from Taft to Knox, Dec. 1, 1911; Governor General's Papers, No. 268, vol. 6(b), Note from Knox to Bryce, Dec. 20, 1911; Confidential Prints, International Boundary Waters, vol. 1, p. 202.

171. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 950-951, Letter from Gibbons to Pugsley (confidential), Feb. 14, 1911; Governor-General's Papers, No. 268, vol. 6(a), Telegram from Lord Grey to British Embassy, Mar. 10, 1911.

172. Governor General's Papers, No. 268, vol. 6(a), Privy Council Minute, August 11, 1911; Confidential Prints, International Boundary Waters, vol. 1, p.187.

the British Ambassador promptly informed the Foreign Office and Knox that the Canadian Government had "appointed" its commissioners and suggested an early meeting with the United States section.[173] The Secretary of the Department of Public Works fell into the same error when he informed the three nominees of their "appointments" at seventy-five hundred dollars per annum.[174]

By the time this confusion had been cleared away and, despite numerous urgent cables to the Colonial Office and Foreign Office during September,[175] the commissions of appointment had not been signed by the King when the Laurier Government was swept from office. One of the first acts of the Borden Government was to inform the Governor General that the new cabinet wished to reconsider the appointments previously recommended by the former administration.[176] To this the Colonial Office acquiesced and, on October 23, the new Governor General (the Duke of Connaught) was requested by Privy Council minute to recommend to His Majesty's Government the cancellation of the earlier nominations and to substitute therefor the names of Thomas Casgrain of Quebec, Henry Powell of New Brunswick and Charles Magrath of Alberta.[177]

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173. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/159, Note from Bryce to Knox, Aug. 16, 1911; Confidential Prints, International Boundary Waters, vol. 1, pp. 187-188, Despatch from Lord Grey to Harcourt, Aug. 17, 1911; Despatch from Bryce to Lord Grey, Aug. 26, 1911.

174. Gibbons Papers, vol. 7, fol. 2, Letter from Department of Public Works to Gibbons, Aug. 17, 1911.

175. Canada, Sessional Paper No. 119, 1912, Letter from J. Pope to the Deputy Minister of Public Works, Sept. 5, 1911; Letter from Pope to Lord Grey, Sept. 5, 1911; Telegram from Lord Grey to Harcourt, Sept. 6, 1911; Telegram from Harcourt to Lord Grey, Sept. 21, 1911; Telegram from Lord Grey to Harcourt, Oct 3, 1911; Confidential Prints, International Boundary Waters, vol. 1, pp. 190, 192, 194.

176. Governor General's Papers, No. 268, vol. 6(b), Memorandum from Borden to Lord Grey, Oct. 11, 1911.

177. Canada, Sessional Paper No. 119, 1912, Telegram from Lord Grey to Harcourt, Oct. 11, 1911; Governor General's Papers, No. 268, vol 6(b), Telegram from Harcourt to Lord Grey, Oct. 14, 1911; Privy Council Minutes 2471 & 2472, Oct. 23, 1911; Confidential Prints, International Boundary Waters, vol. 1, pp. 195-197.

Despite some lobbying by Gibbons to have the original appointments confirmed,[178] commissions for the new nominees were signed and transmitted to the Governor General[179] and in late November the Clerk of the Privy Council informed Gibbons, Barnhill and Geoffrion that their "appointments" were cancelled.[180] Secretary Knox was informed immediately of the new appointments and, by common consent, January 10, 1912 was fixed as the date of the first meeting of the two sections of the Commission in Washington.[181]

* * * * * *

At this juncture it became imperative that serious consideration be given to the nature and character of the role and functions of the Commission and the commissioners. The ensuing discussions of these matters were many and varied and they continue even today as the commissioners, government officials, and numerous others attempt to explain, assess and reassess the role of the International Joint Commission in the relations between Canada and the United States.

In the following pages an attempt is made to assemble this multitude of expressions of views, interspersed with factual information, in a meaningful fashion. Following a collection of the general commentary on the character, functions and roles of the Commission, documentation relating to the appointment of personnel, organization and reorganization of the Commission is assembled. The volume is concluded with a collection in chronological order of the miscellaneous documentation including treatises, periodical articles, speeches and governmental papers relating in some way to the International Joint Commission and Boundary Waters Treaty.

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178. Gibbons Papers, vol. 7, fol. 2, Letter from Geoffrion to Gibbons, Oct 23 & Nov 2, 1911; vol. 9, Letterbook No. 2, Letter from Gibbons to Geoffrion (private), Nov. 17, 1911.

179. Canada, Sessional Paper No. 119, 1912, Despatch from Harcourt to Duke of Connaught, Nov. 18, 1911.

180. Canada, Sessional Paper No. 119, 1912, Letters from Clerk of the Privy Council to Gibbons, Barnhill and Geoffrion, Nov. 29, 1911; Confidential Prints, International Boundary Waters, vol. 1, pp. 199-200.

181. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/ Note from Bryce to Knox, Dec. 1, 1911; Confidential Prints, International Boundary Waters, vol. 1, pp. 202-205.

IV THE CHARACTER AND ROLE OF THE INTERNATIONAL JOINT COMMISSION

A. Defining the Functions: 1911-1912

The first recorded expression of view as to the nature of the International Joint Commission appeared in a letter written by James Tawney to the President immediately after the former's appointment. He viewed the Commission as a purely judicial body.

> A careful study of the Treaty creating this Commission and defining its jurisdiction and powers will show any one that it is the most important permanent international tribunal ever created to consider questions arising between Great Britain, Canada and the United States, and in going over some of the cases now pending in the State Department which this Commission will have to hear and determine, I am convinced that it is not in fact a commission but an international court. Its proceedings will have to be conducted as those of any other judicial tribunal, for it not only deals with the rights and interests of the respective countries, but also finally determines the rights and interests of the citizens of both countries where the claims of such citizens in respect to their rights are in conflict.
>
> There is also a great deal more work for this Commission to do in the next few years which will involve a great deal more time than was supposed. It will have to deal with questions which are entirely new, and as the counsellor for the State Department said a few days ago, in dealing with these questions there are no precedents to follow.[1]

This view he reiterated in rejecting the arguments by Chandler Anderson and Chairman Carter that private applicants under Articles III and IV must be passed upon by the appropriate government department prior to their transmission to the Commission. Such procedure "would reduce the International Joint Commission to an administrative tribunal rather than a judicial one."[2]

When Tawney succeeded Carter as chairman of the

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1. W.H. Taft Papers, Presidential Series No. 2, file 516, Letter from Tawney to C.D. Norton, Secretary to the President, Mar. 14, 1911.

2. I.J.C., Can. Sect. File E-1-1-1, Letter from Anderson to Carter, Apr. 29, 1911; Letter from Carter to Anderson, May 26, 1911; Letter from Tawney to L.W. Busbey, Secretary, U.S. Section, June 16, 1911.

United States section in December, he took the opportunity to raise the issue with the Canadian chairman while making arrangements for the first meeting in Washington.

> Inasmuch as the jurisdiction of our Commission is unlike any similar tribunal in either country, the work of preparing these Rules of Procedure will undoubtedly require some time. There are a number of fundamental questions pertaining to the functions and jurisdiction of the Commission that the Commission will have to settle at the outset. Among these, is the question of whether or not the functions of the Commission, under the Treaty, are wholly judicial, or only partially judicial and partially administrative. Upon the determination of this question rests very largely the nature of the Rules of Procedure to be adopted.[3]

Chairman Casgrain had not formed any opinions on this matter but thought that "our functions are partially judicial and partially administrative. This, I believe, is the view taken of the matter by our Government."[4]

The Commission met for the first time on January 10 in Washington to draft the rules of procedure and each chairman had an opportunity, at the opening session, to express his initial views of the role of the Commission and its commissioners. Tawney left no doubt as to his concept of the judicial body.

> Personally, and on behalf of my colleagues, I express the belief that upon the interpretation of the powers and duties of this Commission and the ability of its members to disassociate themselves in their service on this Commission from their individual relations to their respective governments, depends the success or failure of this international effort to create a judicial tribunal, broader than our respective nationalities and almost continental in its jurisdiction, for the adjudication of differences that now exist or may hereafter arise along our common frontier.
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> . . . [I]n our judgment this International Joint Commission is the most promising agency that has yet been created for

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3. I.J.C., Can. Sect. File E-1-1-1, Letter from Tawney to Casgrain, Dec. 26, 1911.

4. I.J.C., Can. Sect. File E-1-1-1, Letter from Casgrain to Magrath, Dec. 30, 1911.

the settlement of controversies between these two nations; because it brings together, face to face, representatives of Canada and the United States to impartially consider and adjudicate the questions that now exist or that may develop along our international boundaries . . . where two great nations are living as neighbours but under two national jurisdictions.

. . .

. . . This Treaty of 1910 begins the 20th century with a commission to which may be referred for inquiry and adjudication all possible questions of disagreement between the Dominion of Canada and the United States, their provinces and states and their respective peoples. This is an effort to write into international law the sentiment of the peoples of two great countries . . .

. . .

The chief cause for congratulation, however, is that this Treaty has provided a means for frank, direct and constant relations between the two great neighbouring peoples who inhabit the greater part of the North American continent, and who must live in amicable relations to realize the ultimate ideal of our Anglo-Saxon civilization. This Commission constitutes the medium for this direct communication, and to it, by the express terms of the Treaty, may be referred for consideration and settlement all questions of difference that may arise between the people living along our common frontier. Although the Treaty was signed on January 11, 1909, it expressly authorizes and clothes this Commission with jurisdiction to consider and determine all questions of difference, without reservations or qualifications of any kind. As a distinguished Canadian jurist, Mr. Justice Riddell . . . has well said: "This may be called a minature Hague Tribunal of our own; just for us English -speaking nations of the continent of North America."

I am not idealist enough to assume that any of us can wholly divest himself of national sentiment to here assure the world that he has reached that stage of human perfection that constitutes the absolutely impartial judge in international affairs; but I believe we all realize our obligation to fairly and fully examine every question that may be presented and try to reach a judicial settlement that may contribute to the better understanding and bear out the spirit of the Treaty, which is an agreement in part for the joint regulation of common property of great value to the peoples on both sides of the International Boundary. I do not understand that we are the agents of separate governments

> to meet and bicker over contested questions, but rather the joint representatives of the two governments to co-operate in the examination and judicial settlement of questions that are of mutual interest.
>
> As members of this Commission, we are, therefore, neither Canadians nor Americans, but we are each and all representatives of all the people on both sides of our International Boundary line. We can have before us no disputes or disagreements about where the boundary is, and in so far the employment of the terms "Boundary Treaty" or "Waterways Treaty" is misleading. We are to consider the uses, diversions and obstructions of the boundary waters as a primary duty and also adjudicate any and all other questions of difference or disagreement between the peoples of the United States and Canada as may from time to time be referred to the Commission by the mutual action and consent of the two governments. It is, therefore, no insignificant or mere temporary and incidental work we face in the organization of this Commission. We have a great responsibility resting upon us to shape our work so as to vitalize the international powers conferred by the Treaty . . .
>
> I hope that whatever else we may accomplish we shall demonstrate the wisdom of Great Britain in clothing the Dominion of Canada with responsibility of conducting her own foreign relations with the United States that fall under the jurisdiction of this Treaty through the medium of this Commission, and that the present neighbourly feeling will be strengthened by the manner in which we consider and determine the questions that will be presented.

Tawney thought the credo of each Commissioner might be:

> Although I am a citizen of but one nation I am constituted a judge for both. Each nation has the same, and no greater right, to demand of me fidelity and diligence in the examination, exactness and justice in the decision.[5]

In reply, Casgrain was brief and most reserved in his remarks, emphasizing more the fact that this was a British commission.

> . . . We concur with the Chairman in the belief that the appointing and bringing together of this Commission will go far to settle amicably between two neighbours questions which otherwise might become embarrassing.

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5. I.J.C., Can. Sect. File E-1-1-1, Mr. Tawney's Remarks; Confidential Prints, International Boundary Waters, vol. 1, pp. 212-215; Governor General's Papers, No. 268, vol. 6(b).

> We feel sure that working in conjunction with gentlemen who have distinguished themselves in the service of their country, and who are known not only for their profound knowledge of public affairs, but also for the broad spirit with which they approach matters of importance, we will be able to contribute our share towards maintaining that "firm and universal peace between His Britannic Majesty and the United States" of which the Treaty of Ghent speaks.
>
> We are fully alive to the honour and responsibility of the position to which we have been appointed by His Majesty the King. We are citizens of an integral part of the British Empire, one of the Dominions beyond the seas, and by the very nature of things, living on this continent and being in constant communication with our very good neighbours, the citizens of the United States, we are in a position to see with our own eyes and judge with our own minds what is to the best advantage of the Empire we represent. For this reason, His Majesty's Government, which is ever solicitous of giving to British subjects, in whatever part of the Empire they may be, and whatever may be their race, creed or colour, the greatest measure of liberty and autonomy, has delegated three of His Majesty's Canadian subjects to meet the delegates of your great Republic and to deal in a fair, impartial and judicial spirit with the important questions mentioned in the Treaty.[6]

The first draft of the rules of procedure which was agreed upon by the Commissioners after several days of consultations, reflected strongly Tawney's views of the Commission as a judicial body. The two governments were characterized as "applicant" or "respondent" as the case might be in appearances before the Commission. Applications were to be made by way of petition, in form corresponding to that before a court of law. An "answer" was to be filed in reply to the "petition", followed by a "formulation of issues", with no "further pleadings" in the absence of permission from the Commission. Interested private parties might intervene on application and the Commission might hold a "preliminary hearing". Parties could obtain an order for "production and inspection of documents" and might apply

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6. I.J.C., Can. Sect. File E-1-1-1, Mr. Casgrain's Response: Confidential Prints, International Boundary Waters, vol. 1, pp. 215-216; Governor General's Papers, No. 268, vol. 6(b).

for permission to take "depositions". Evidence was to be received under oath, with examination and cross-examination of witnesses permitted. All "briefs, factums, pleadings and documents" were to be printed and filed as in a court of record. The only reference to proceedings under Articles IX and X was the final rule which made the foregoing rules apply insofar as they were applicable.[7]

The draft rules were submitted to the two governments and several other persons for comment and the observations which were forthcoming were illustrative of the diverse views of the role and functions of the Commission. But first, it is instructive to observe the comments of the British Ambassador on the proceedings of the first meeting of the Commission in Washington.

> The proceedings were very amicable throughout, but as the meeting was of a preliminary character [it?] might have been expected to be merely formal and devoted exclusively to settling points of procedure. In the opening speech, however, of the Chairman of the American section . . . considerable, and in the opinion of some, excessive stress was laid on the international and judicial features of the Commission. One object of the Commission is no doubt that of "promoting closer and more direct relations between the two great peoples of this continent" and the Commission does no doubt "constitute a medium for this direct communication". It may even be called a "minature Hague Tribunal" and will also without doubt "demonstrate the wisdom of Great Britain in clothing the Dominion of Canada with responsibility of conducting her own foreign relations with the United States that fall under the jurisdiction of this Treaty through the medium of this Commission." But the propriety of the reply of the Chairman of the Canadian section in bringing into equivalent prominence the fact that they represent Canada as "an integral part of the British Empire" and feel their responsibility to aim at "what is to the best advantage of the Empire" deserves to be noted and commended as eminently fitting.
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> Connected with this difference in point of view and of much more practical importance to the utility of the

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7. I.J.C., Can. Sect. File E-1-1-1, (First Draft) Rules of Procedure of the International Joint Commission, January 1912; Confidential Prints, International Boundary Waters, vol. 1, pp. 216-221; Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/181; Governor-General's Papers, No. 268, vol. 6(b).

Commission was the line taken by the United States section of the Commission in regard to the judicial character to be given to its functions and status. The view was advanced and pressed on the acceptance of the Canadian section that the Commission was a Tribunal in which neither section were to have any representative significance or any separate relation to the Governments. The Governments would be represented before them by Counsel like any other private party. Neither section would take action apart from the Commission as a whole in regard to matters concerning it; or would even take cognizance of any such matter until it was submitted to the whole Commission. And further various forms of declaration were presented to and pressed on the Canadian section the effect of which was that they would only deal with matters judicially and "according to law." To these proposals the Canadian Commissioners prudently demurred for various reasons. Mr. Magrath who has, I understand, considerable practical experience as an Engineer and whose presence on the Commission will be of corresponding value pointed out that to recognize such a view of the Commission's powers and duties would make him useless. I may observe that all these American Commissioners are lawyers which may account to some extent for their wish to place the Commission on a purely legal basis. But taking a larger view -- such a limitation would have not only been quite different from the intentions of those who established this interesting and important innovation in international relations -- but would have gravely compromised its value, and was finally in no way justifiable by the terms of the treaty.

As I pointed out to the Canadian Commissioners when they consulted me, they were required by Article XII of the Treaty to make declaration at their first meeting to "faithfully and impartially perform" their duties; and that they could not properly do more or less than that. Further, that such a step as was proposed was one which should not be taken without reference to the Governments concerned. They were quite of the same opinion and their only difficulty was in devising a course which would render abortive the scheme of the American Commissioners without disturbing the harmony of the first meeting.

This task was, however, eventually facilitated by the withdrawal of two of the United States Commissioners from the position they had assumed. It is possible that this position may have been taken up under the influence of a small group of international jurists of somewhat purist and unpractical tendency known to

> exist here and may have been abandoned under the influence of opinions of the opposite character emanating from the State Department. The question has nominally been merely postponed but will not, I think, give more trouble.
>
> I was much impressed by the aptitude and ability in a situation of some diplomatic difficulty shown by Mr. Casgrain, . . . This, combined with the legal reputation enjoyed by Mr. Powell and the practical experience of Mr. Magrath promises well for the furtherance of Canadian interests before the Commission and for the success as a whole of this very interesting experiment in the adjustment of international claims or controversies.[8]

Bryce's views on the Commission were supported by the Canadian authorities to whom the draft rules and a confidential memorandum thereon prepared by a United States commissioner were submitted for opinions. Chief Justice Charles Fitzpatrick was highly critical of the attempt in the memorandum and in the rules to assert a judicial character for the Commission.

> Further reflection has confirmed the impression received when I first read the Treaty, the proposed Rules of Procedure and the draft Memorandum with reference to the duties and functions of the International Joint Commission. The Treaty is most inartistically drawn and the legislation passed last session to give effect to it is, in my opinion, in some respects, of doubtful validity. For instance, section 2 is undoubtedly within the legislative power of a provincial legislature or ancillary to the treaty-making power of the Imperial Parliament; but I do not quite see how it is possible for the Dominion Parliament to justify such a provision. "Canada a nation" is a good thing to talk about; but remember that there is no such "diplomatic entity". However this is as to the past.
>
> Now dealing with the documents submitted. I am firmly of opinion that any dogmatic assertion of the judicial status of the Commission is in the first place certainly premature and in the second probably prejudicial to its usefulness. I should have thought that the Commission was intended to be administrative as well as a judicial

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8. Governor General's Papers, No. 268, vol. 6(b) Despatch from Bryce to Sir Edward Grey and the Duke of Connaught (confidential), Jan. 19, 1912; Confidential Prints, International Boundary Waters, vol. 1, pp. 211-212.

body and therefore authorised to deal with all matters submitted to it ex aequo et bono on the broadest basis. In my opinion, the treaty will require very liberal interpretation and for this reason alone its interpretation should be left to be worked out in practice rather than laid down in principle beforehand. But, loose as the language of the Treaty is in places and confusing as some of its provisions are, I have not been able to find any justification in it either for the principle of judicial solidarity of the Commission, or for that of judicial segregation of the Sections from the Governments which the American section advanced and which is embodied in the memorandum.

Moreover, as one may suspect, (?) a political design in this attempt at an interpretation of the treaty, and as it might tend, if accepted, to affect the imperial element in the relation of Canada and the United States by setting up across it a sacrosanct international judicial bench, and this attempt, if realised should not recommend itself to any Government least of all the present one; and as the result of this interpretation would be to so prejudice the practical use of the Commission, there seems really any (no?) need to expose in detail the defects and difficulties inherent, in this memorandum. Any attempt to put that memorandum forward at the next meeting should, in my opinion, be resisted by the Canadian Section on the simple and sufficient ground that I have already put forward in the course of our conversation, viz, that the treaty requires you simply to make declaration at your meeting "to faithfully and impartially fulfill your duty"; and to do more would be useless, perhaps harmful.

As to the rules of procedure in so far as these are formal or relate to organisation, etc. they are unobjectionable and can be left to the Commission. The chapter in them in which I think changes chiefly necessary is that as to procedure entitled "application". The theory underlying this procedure is the judicial one already referred to. Its most objectionable results is the requirement that makes the two Governments -- on whose mutual relations the whole sanction of the Commission rests -- appear as "petitioners" and as parties contestant before it as a tribunal. This is a confusion of substance in an attempt to represent the unity of person of the Commission. It could not but embarrass rather than expedite settlements. At present I am disposed to think the right procedure would be for a private interest to present its petition to the competent Department which here would be the new Department of Foreign Affairs -- if endorsed by them it would be sent to the Commission

and represented before them by Counsel. If either Government wishes to come before the Commission, it could do so in the person of the competent expert Department which, with the formal approval of the Foreign Department, would appear by Counsel -- thereby leaving the Governments as Governments, free to support the decision of the Commission or to decide on its recommendations or at the worst to overrule its mistakes.

. . .

The matter may have an importance even outside that of Canado-American relations, for this Commission was taken as a precedent for the Anglo-American Commission in the General Arbitration Treaty now under discussion here. As to the intention of that Treaty in this respect, I can speak with assurance and affirm, but very confidentially, that a "judicial" body as is now suggested for the Canado-American relations was never theoretically contemplated nor would have been considered practical for the purpose in view in Anglo-American relations. This being so it seems even more unsuitable to the former in which mostly administrative questions will be handled; whereas in the latter they will be mostly though by no means exclusively "justiciable".

It is the old attempt which has done -- as we know -- so much harm already, to try and go too fast in developing judicial settlement of international disputes via arbitration out of diplomatic settlement. In a word, I recognized throughout the voice of Senator Turner, but the hand of Mr. James Brown Scott. We should stand for the old favorite "International Commission" by "diplomacy out of good relations", whereas Mr. Scott wants an "arbitral tribunal" out of the Hague".[9]

A memorandum prepared by the Deputy Minister of Justice was of similar tenor.

A draft memorandum (confidential) with reference to the status and functions of the tribunal . . . said to have been prepared by the Commissioners or some of them, has been referred to me, also copy of draft rules of procedure (confidential).

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9. I.J.C., Can. Sect. File E-1-1-1, Letter from Fitzpatrick to Magrath (private), Jan. 30, 1912.

The draft memorandum, upon the recital that the Commission is an international court, proposes that the Commission resolve that it shall approach and consider all questions submitted to it under a high sense of judicial responsibility in accordance with the principles of law and justice applicable thereto.

By article 8 of the treaty certain rules and principles are adopted . . . for the government of the Commission, and by article 12 it is provided that each commissioner shall . . . subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under the treaty.

The principles and rules so established, to be observed by the Commission, are rules of policy dependent upon the sanction of the High Contracting Parties, and not rules of law.

The treaty by article 2 provides for legal rights and remedies, but these are to be enforced in the courts and not by the Commission.

. . .

It is submitted, having regard to the provisions of these articles, that the ordinary questions with which the Commission is concerned are questions of expediency and not questions of law, although of course legal questions may occasionally present themselves. The tribunal is by its constitution a commission, not a court, and the proposed resolution is inappropriate, first because it claims for the Commission a character which it does not inherently have, and, secondly, because the Commission has no power by its declaration to affect its own constitution or powers.

The Commission is given power by article 12 to adopt such rules of procedure as shall be in accordance with justice and equity. It cannot of course by these rules limit or extend its jurisdiction. Some of the rules are of questionable validity, for example, Rule 24, authorizing the issue of commissions, and Rule 29, with regard to the service of process; but the principal objection to the rules as drafted is that they seem to be framed upon the assumption that the proceedings before the Commission are to be inter partes, and that the two contracting powers are to be impleaded before the Commission as suppliants and respondents. The treaty and the legislation by which it is sanctioned, so far as I am able to understand, do not contemplate any such procedure, and it is moreover inconsistent with the constitution of the tribunal and the dignity and relations of the contracting parties that they should be put in that position.

> Rules 6 and 7 refer to procedure by petition, naming the King and United States as petitioner and respondent, as the case may be.
>
> Rule 17 enables the Commission to direct the preparation of issues, and there are similar provisions in other rules pointing to the notion on the part of the draftsmen that the tribunal is exercising compulsory jurisdiction over the two governments as litigating parties subject to the authority of the Commission, similar to that which a court of justice has with respect to ordinary suitors. This misconception is founded doubtless on the draft resolution which underlies the rules, and which enunciates the principle that the Commission is an independent court of justice; whereas in truth its functions are mainly administrative, and should consist for the most part of inquiry and report upon references made by the respective governments, not necessarily or prima facie involving disputes or litigation.
>
> It may be observed that even the Hague rules, which provide for the procedure of a very elaborate court to determine international disputes, do not attempt to assert jurisdiction in the manner of these rules. The quality of the Latin in Rule 7(d) is remarkable.[10]

The draft memorandum concerning the duties and functions of the Commission referred to in the foregoing memoranda was one prepared by Commissioner F.S. Streeter for the three members of the American section in advance of the first meeting. It set forth his case for ascribing to the Commission a purely judicial status.

> I. The Treaty contains no grant of power to either Section of the Commission acting independently except to organize by choosing a Secretary and, by necessary inference, a Chairman.
>
> All other powers conferred by the Treaty are vested in the Commission acting as a joint tribunal.
>
> II. If the Commission were a body of negotiators and each Section represented its own Government, its procedure and rules would necessarily have to be elastic and conform to diplomatic usages and methods.
>
> But the terms of the Treaty furnish no warrant for such construction.
>
> III. If the duties and functions of the Commission are in their nature judicial, then of necessity the Commission

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10. I.J.C., Can. Sect. File E-1-1-1, Memorandum from E.L. Newcombe tc the Prime Minister, Jan. 31, 1912.

is an International Court and its procedure must be judicial and its rules be Court rules.

IV, Examining the scope and provisions of the Treaty it appears (1) that certain matters are to be submitted to the Commission for final decision, (2) others for investigation and report to either or both Governments.

Certainly with reference to the first class of questions and, in a broad view, the second class also, the Commission will act as a judicial tribunal and should therefore decide all matters submitted to it under a high sense of judicial responsibility. Its procedure should be strictly judicial and in the exercise of its functions it should be as independent of the two Governments as a Court or any judicial tribunal is independent of the Executive.

V. At the first formal meeting of the Commission for organization a preamble and resolution in substance as follows should, we think, be adopted, spread upon the records of the Commission and published as a general principle governing this Commission and the procedure before it:

Whereas the duties and functions of the International Joint Commission as prescribed by the Treaty between the United States and Great Britain proclaimed May 13, 1910, are in their nature judicial and its decisions final, therefore, be it,

RESOLVED that this Commission will approach and consider all questions submitted to it under a high sense of judicial responsibility in accordance with the principles of law and justice applicable thereto,

and in matters of procedure will be governed as nearly as may be by the general usages and practice of judicial tribunals in the United States and in the Dominion of Canada.[11]

On January 16 Streeter moved adoption by the Commission of a somewhat varied version of this resolution.

Whereas, the Treaty contains no grant of power to either Section of the Commission to act independently except to appoint a Secretary and by necessary inference a Chairman, and all other powers conferred by the Treaty are vested in the Commission as a joint tribunal, and

Whereas, the duties and functions of the Commission as prescribed by the Treaty are in their nature judicial, therefore,

Resolved, that this Commission will approach and consider all questions submitted to it under a high sense of

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11. I.J.C., Can. Sect. File E-1-1-1, Draft of Memorandum with Reference to the Duties and Functions of the International Joint Commission under Treaty Proclaimed May 13, 1910 (undated).

> judicial responsibility, in accordance with the principles of law and justice applicable thereto.

On motion of Commissioner Powell, consideration of this resolution was deferred until the rules of procedure had been drafted and considered by the Governments.[12] It was not subsequently adopted.

In the United States, Knox had Anderson undertake a consideration of the draft rules of procedure. Anderson, after consulting Root for his views on the question of the position of the governments before the Commission,[13] prepared a memorandum which the Department sent to Tawney.

> . . . In forwarding this memorandum the Department desires to have it understood that the suggestions made in it and the omission to make suggestion with regard to the rules not mentioned in it, are not to be regarded as committing the Department on any question which may ultimately arise as to the interpretation of the treaty.
>
> In accordance with your suggestion that it would be advisable to lay the questions under consideration before Senator Root inasmuch as he could speak with more authority than any one else with regard to the purpose and meaning of the treaty which was negotiated under his direction, I have submitted to him the proposed rules and the Department's memorandum thereon. He has found it impossible to examine them in detail, but at an interview which I had with him this morning he expressed the view that the rule requiring that a petition affecting boundary waters should be authorized by one of the Governments before it is submitted to the Commission for approval, would be more likely to arouse controversies between the Governments than to settle them, and that the chief purpose of this treaty was to settle or avoid controversies. He pointed out that the granting of authority by the Government in many cases would involve the exercise of the political power of the Government, and that this is a power over which even the Supreme Court of the United States does not undertake to exercise control; and that naturally the national members of the Commission would be inclined to support their own Government in such a matter, which would result in bias and partisanship, and not only prevent the Commission from settling questions, but might produce controversies which might

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12. I.J.C., Can. Sect. Library, Record of Proceedings, vol. 1, p. 15.

13. Anderson Papers, box 11, Letterbook p. 218, Letter from Anderson to Root, Jan. 30, 1912.

> not otherwise arise. On the other hand if an application is submitted to the Commission for its approval before it is finally authorized by either Government, the Commission will not be confronted with any question involving national feeling, and they will be more likely to come to an agreement, and whatever conclusion they reach will have much greater weight. If the application is denied by the Commission, that would probably put an end to the question; or, if the application should be granted, that would unquestionably influence the Government concerned to follow the same course, but in either case a controversy between the two Governments is less likely to arise if neither Government is required to take final action before the question is submitted to the Commission.

In his memorandum, Anderson did not concern himself with how the Commission was to be characterized but rather, dealt with the practical operation of the Commission. He did, however suggest a number of changes in the rules designed to de-emphasize the proposed litigative nature of the process. He insisted that neither government stood in the relation of a petitioner or a respondent in proceedings before the Commission. Nor did a government present a case on behalf of a private party; it merely transmitted the petition in its discretion. He also emphasized throughout the document that the governments were in no way made subservient to the Commission; they retained their complete sovereignty, and any of the rules that suggested otherwise must be changed.[14]

George Turner of the United States section, a former judge, submitted a lengthy brief on the proposed rules, admitting no doubt as to the judicial status of the Commission and devoting much attention to the question of the right of private individuals to appear before the Commission. Examining the preamble and clauses of the treaty, he concluded that it was demonstrably clear

> . . . that one of the nations must be in court, either as petitioner or respondent, in every case, because it can not be supposed that the Commission, devoid of final process or of power to enforce its awards, is invested with power to determine disputes between

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14. Anderson Papers, box 11, Letterbook, p. 222, Letter from Anderson to Tawney, Jan. 31, 1912, enclosing Memorandum upon the First Draft of Rules of Procedure for the International Joint Commission; I.J.C., Can. Sect. File E-1-1-1; Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/181.

> individuals alone. If one nation then must be in court in every case, it follows that the other nation must likewise be in court. It would be preposterous to suppose that either nation had consented to be haled into court at the instance of every irresponsible inhabitant of the other nation. Moreover, since the Commission is powerless to enforce its awards, but the latter are dependent for their sanction on the good faith of the two nations, the nations must be before the tribunal in every case as a party, that no other parties are needed, and therefore that no other parties were contemplated.
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> . . .
>
> If, as it seems to me, there can be no formal parties before the Commission, other than the two governments, then the rules suggested, while not inapplicable, are not those best adapted to the needs of the litigants, and the convenience of the Commission. In causes submitted by the two governments, no process is necessary, and the causes had best proceed under the rules of the permanent Hague Court, modified where necessary to suit changed conditions.
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> . . .
>
> If the Hague rules should be adopted, in a modified form, the rules of evidence and the method of producing evidence, should be those prevailing in courts administering the civil law, because the evidence should have a broader scope, and be more conformable to the needs of an international tribunal, than that receivable under the rules prevailing in the courts of law and equity in the two countries.[15]

The commissioners met again on February 1 and 2 to consider the observations and suggestion which had been made. Although changes were made to avoid the appearance of the governments as "petitioner" and "respondent" and to modify the procedure for private applications, the rules of procedure as finally adopted reflected very strongly the judicial character of the Commission as originally asserted by Tawney and Streeter.[16] And, to add early emphasis to his contention that as a judicial

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15. I.J.C. Can. Sect. File E-1-1-1, Observations on the Proposed Rules for the Consideration of the American Commissioners, (undated).

16. I.J.C., Can. Sect. File E-1-2-1, Rules of Procedure of the International Joint Commission.

body the Commission could act only as a single entity, Tawney returned to the Acting Secretary of State the first application transmitted to the United States section, instructing the Secretary that all matters under the treaty must be addressed to the International Joint Commission since neither section constituted the Commission.[17] Acting Secretary Wilson, resubmitting the application properly noted tartly:

> I have the honor to make, for the consideration of the Commission, the suggestion that the form of question to be presented and the course to be pursued by the Parties to the treaty in submitting questions to this Commission, which they have constituted for their own convenience, would seem to rest with the parties themselves for determination, and for the present the Department reserves that question for further consideration.[18]

Tawney continued to seize every opportunity to spread his gospel on the nature of the Commission. At one of the first hearings held by the Commission, he reminded his colleagues and the public:

> . . . It [the Commission] is the first organization of its kind -- permanent institution I should say -- ever created by two nations for the purpose of settling controversies that may arise between them from time to time, which institution is composed wholly of citizens of the two nations who are parties to these controversies. Our success will depend not only upon the personnel of the commission and the degree of effort that we put forth for the purpose of bringing about the amicable and satisfactory settlement of these controversies, but it will depend, to a certain extent, upon the inhabitants of the two countries and the extent to which they bring themselves to realize the difficulties and the conflicting interests with which we have to deal. If the members of this commission took into consideration or were influenced by their own citizenship, it is likely that the commission would fail; but to the extent to which we can disassociate ourselves from our national citizenship and consider and determine these questions upon an international citizenship; to that extent our organization will be a success in the determination of these questions.[19]

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17. I.J.C., Can. Sect. File E-1-1-1, Letter from Tawney to H. Wilson, Apr. 2, 1912.

18. I.J.C., Can. Sect. File E-1-1-1, Letter from Wilson to Tawney, Apr. 4, 1912.

19. I.J.C., Can. Sect. File E-12, Statement by J.A. Tawney at Hearing in Kenora, Sept. 1912.

He also set forth his views of the judicial processes of the Commission in the editorial pages of an international law journal.[20]

On the Canadian side, the commissioners were less assertive of the role of the Commission. In an elaborate brief on the treaty prepared by Magrath in 1912, it was merely pointed out that the purpose of the treaty and the Commission was to remove the various categories of issues from the realm of local prejudices and politics and to place them in the hands of an impartial tribunal. Magrath noted the emphasis placed by the United States commissioners on the judicial role of the Commission and confined his observations to reiterating Bryce's opposition to this view.[21]

Gibbons, however, who apparently was not consulted by the government when the rules of procedure were under consideration, had very definite views on the role and functions of the Commission. He had, in fact, indicated his views on the matter during the negotiations and they corresponded essentially with Tawney's. Addressing the Empire Club in 1911, he explained the treaty as establishing fundamental principles of international law to govern the uses of international waters and described the Commission as the judicial tribunal charged with applying these principles. He ascribed particular importance to the provisions of Article IX.[22] In a later address to the Canadian Bar Association he laid great stress on the judicial character.

> The Commission is not, as some members of Parliament thought, a diplomatic body in any sense. It is a judicial body sworn to decide in accordance with justice. It is not a Board of Arbitration composed in whole or in part of members appointed with the special object of obtaining victory for their side in any special controversy. The permanent character of the Commission is its greatest strength. Its success, and in fact its very existence, depends upon

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20. "The International Joint Commission between the United States and Canada", 6 A.J.I.L 191-197 (1912).

21. Magrath Papers, vol. 6, file 25, Confidential Brief on Waterways Treaty (undated).

22. G.C. Gibbons, "The International Waterways Treaty", Empire Club Speeches, 1910-1911, pp. 241-252.

> its members carrying out their work in the spirit of their oath of office. If the sole object of the Board is to find out what ought to be done, having regard to the principles adopted, its task will be comparatively easy, whereas if the members representing each country seek in any case to obtain an unjust advantage the Commission will be a failure and its members will find it impossible to continue their work successfully.[23]

Support for this view of the Commission was forthcoming from the editorial pages of the American Journal of International Law, presumably from the pen of its editor in chief, James Brown Scott. Analysing the operative articles of the treaty, the editorial concluded:

> . . . That is to say, in the differences specified in Articles III and IV of the treaty the commission is to act as a court of law and render judgment, whereas under Article IX the commission shall on the request of either government examine and report on the law and the facts, but their findings shall not be binding either as a decision or as an arbitral award. It is, however, important to note that the contracting parties agree to refer questions from time to time and that an obligation to do so is created by express language, for in such cases the word "shall" is construed as mandatory. Were the commission limited to these important categories it would be able to render signal service to the cause of international peace and understanding; but the tribunal is invested with a greater usefulness by Article X, although a moral, rather than a legal, obligation is created . . . . It is not too much to say that this article constitutes a permanent international tribunal between Canada and the United States to which any questions or matters of difference arising between them may be referred and decided by the principles of law and justice.
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> . . .
>
> The opportunity is afforded the commission to establish beyond preadventure the advantages of a permanent international tribunal in deciding according to law and justice controversies that arise between the United States and the Dominion of Canada, and it is gratifying to learn from the addresses delivered by Mr. Commissioner Tawney . . . and by Mr. Commissioner Casgrain . . . that the importance of the tribunal and the services it may

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23. G.C. Gibbons, "International Relations", Papers Relating to the Work of the International Joint Commission, 1929, pp. 7-17; Gibbons Papers, vol. 14, fol. 3.

render, if it acts under a sense of judicial responsibility, are fully appreciated by the tribunal as a whole . . . .[24]

B. Testing the Theories

The Commission had been operative only a couple of years when it was subjected to considerable criticism, particularly in Congress, for the small amount of work which it seemed to be handling. This criticism brought forth a spate of speeches and articles in defence of the Commission, seeking to define and clarify its role in light of experience.

In a memorandum to the Secretary of State, R.B. Glenn of the United States section outlined the nature and role of the Commission, emphasizing the fact that the Commission could deal with any matter provided the governments were prepared to make the necessary references.[25] George Koonce as United States counsel reminded his government that

> . . . [i]t should be remembered that the commission is a creation of the two Governments, and that its power and authority are only such as have been vested in it by the treaty. I do not think that it has any administrative functions, certainly it has no powers of an executive character. It has no way of enforcing its orders, it must rely upon the executive authority of the respective Governments. In fine, it is an instrumentality for ascertaining, fixing, and expressing international purposes concerning the things with which it has to do, but it is not an arm for executing the international will.[26]

Canadian counsel also came to the defence of the Commission. F. H. Keefer felt that

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24. "Boundary Waters Treaty Between the United States and Canada" 4 A.J.I.L. 668-675 (1910); "The International Joint Commission Between the United States and Canada", 6 A.J.I.L. 191-197 (1912).

25. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/250, Memorandum on the International Joint Commission--Its Duties and Scope, Apr.1, 1914.

26. I.J.C., Can. Sect. File E-12, Statement by George Koonce, Excerpts from Early Proceedings of the Commission, 1914.

> . . . [a]fter three years experience with the members of the Commission, I am unable to thoroughly express my admiration for their impartiality, for their judicial manner, and for their intention, which they have always revealed, to reach the truth and rightness of the international problem.[27]

C. S. MacInnes was more explicit in his rebuttal.

> It is clear that by the constitution of the International Joint Commission very complete machinery has been provided for the removal of difficulties between the United States and Canada. The Commission can prevent any misuse of the common waters. On the request of either country it can examine into any question concerning the frontier. With the consent of both countries it can decide any question arising between them. It is not a self-acting body, however, so that its value will depend upon outside circumstances, as well as upon the character of its work.[28]

At the congressional level, Senator Wesley L. Jones of Washington rose on the floor of the Senate to "answer and refute reckless statements recently made to the effect that this Commission was an unnecessary organization and had thus far accomplished practically nothing." Pointing out that in its three years of existence the Commission had settled more problems than were settled by diplomacy and had settled them in a judicial manner, he concluded:

> Without an international tribunal of some kind whose jurisdiction, in the settlement of international controversies or in the determination of individual rights and interests, may be invoked by the people of these two countries as well as by the Governments themselves for the prompt settlement of such controversies or for the ascertainment and determination of their respective rights and interests, there is no existing instrumentality available for that purpose except the diplomatic agency of the two Governments. Diplomacy does not afford the people of the two nations, whose rights and interests are involved in any international controversy or in a controversy between themselves, the opportunity to appear face to face to have their controversies determined upon sworn testimony and according to the

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27. I.J.C., Can. Sect. File E-12, Brief by Keefer, Excerpts from Early Proceedings of the Commission, Mar. 31, 1916.

28. C.S. MacInnes, "The International Joint Commission", (1915) Papers Relating to the Work of the International Joint Commission, 1929, pp. 43-47 (underscoring added).

> principles of law. The necessity, therefore, for the existence of this International Joint Commission or of some similar international tribunal will exist as long as there is necessity for the existence of courts either in the United States or Canada for the determination of controversies arising among their own people. This is so because of the intimate commercial, industrial, and financial relations, and also because of the exercise within their respective governmental jurisdiction of their common right to the use of the water which marks the international boundary between them.
>
> The treaty between Great Britain and the United States creating this international court of justice marks the most advanced step yet taken by any two nations in the history of the world, not only for the settlement of international questions arising between them, but also for the settlement of questions of less consequence from an international standpoint between the people of both nations.
>
> . . . This Commission, therefore, charged as it is with the duty, and having the power to work out practically the great problem of whether or not the theory of international peace through the instrumentality of a court of arbitral justice can or can not be made a success, should have the hearty support and encouragement of both Governments and their representatives.[29]

The commissioners, too, passed up no opportunity to explain and to publicize the work of the Commission, attempting to justify its existence and continuance. Tawney, before the Canadian Club of Ottawa, wondered if the public indifference to the work of the Commission stemmed from the fact that the body operated so effectively, harmoniously and quietly. He emphasized the Commission as an "international judicial tribunal settling all matters of a justiciable character", noted its special feature as an international court allowing individuals to appear before it and predicted that there would be a constant stream of matters coming before the Commission for decision in the future.[30]

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29. W.L. Jones, "International Joint Commission of the United States and Canada", (speech in the United States Senate, Feb. 26, 1915) Papers Relating to the Work of the International Joint Commission, 1929, pp. 18-26.

30. Magrath Papers, vol. 6, file 20, J.A. Tawney, "The International Joint Commission", Oct 6, 1915.

Senator Obadiah Gardner on his appointment to the American section extolled the virtues of the Commission: impartiality, fairness and equity.

> . . . And without regard to the personnel of the commission I contend that as long as there is cause in either Canada or the United States for the maintenance of the courts of justice, just that long there will be reason for the maintenance of the International Joint Commission.

To demonstrate the impartiality, Glenn added:

> I can say to you that when these questions [under the treaty] come before us, whenever it appears to me that a Canadian Government is right, I would give them my decision and my vote if it was contrary to the wishes of every man and woman in the United States of America.[31]

Even Magrath broke his silence and, in a speech prepared for delivery before the International Polity Club of Yale, he explained the importance of having dedicated commissioners able to perform in a judicial rather than a diplomatic role. He quickly added, however, that it was desirable to have laymen as well as lawyers on the Commission.[32] This he re-emphasized in a letter to one of his colleagues, complaining of the lack of cooperation and support which he felt he was getting from his fellow Canadian commissioners.

> . . . I have no legal training and I must assume so long as the Government feels fit to keep me on the Commission that it does not consider the Commission's functions purely judicial . . . I fear that there is a tendency both on your part and Mr. Powell's to look at questions as if you were in a court of law.[33]

However, the chief advocate, defender, expositor and propagandist of the International Joint Commission was the long-time Secretary of the Canadian section, Lawrence J. Burpee, who, from 1912 until his death in 1946, produced some dozen or more lengthy papers relating to the nature and work of the Commission, attempting to make it known and to defend it from attack. In

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31. I.J.C., Can. Sect. File E-16, Speeches delivered by the Commissioners at the Manitoba Club, Winnipeg, Feb. 4, 1916.

32. Magrath Papers, vol. 1, Letterbook No. 21, pp. 226-250, Speech for delivery to the International Polity Club of Yale, Mar. 30, 1916.

33. Magrath Papers, vol. 6, file 20, Letter from Magrath to Mignault (confidential), Oct. 24, 1916.

his first publication he stressed the relatively speedy process of dealing with problems by the Commission in comparison to the cumbersome process of diplomatic settlement. This coupled with the real impartiality of the commissioners led to satisfactory settlements. There was no doubt in his mind that the Commission would have a continuing role after the first five years.[34]

In his next few publications, he dwelt on the nature of the Commission, attempting to answer what he felt were the flaws in the arguments of the Commission's detractors. The Commission was, after all,

> . . . a radical new experiment with a body of unusual jurisdiction and it is not self-acting and therefore, will depend in large part for its success on the willingness of the two governments to make use of it.
>
> One may not perhaps realize at first the very unusual character of this tribunal. There is nothing else quite like it, nor has there been in the past. We have here three Americans and three Canadians, sitting not as national sections, more or less antagonistic, but as one judicial body, and pledged to give their best possible judgment, with utmost impartiality, to the settlement of questions that arise sometimes on one side of the boundary and sometimes on the other . . . . The Commissioners have not approached these questions as two distinct groups of national representatives, each jockeying for advantages for its own side, but rather as members of a single tribunal, anxious to harmonize differences between the two countries, and to render decisions which would do substantial justice to all legitimate interests on both sides of the boundary, and particularly to those of the common people.
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> . . .
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> Unintelligent or narrow criticism, based upon the wrong ideas of the Commission's functions and powers, or based upon the hypothesis that its members should think and act as partisans of their respective countries, must inevitably weaken the influence of the Commission, and nullify to a very large extent the effectiveness

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34. L.J. Burpee, "The International Joint Commission", University Magazine, Oct. 1915; Magrath Papers, vol. 6, file 25; Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/290.

> of its work in removing points of international friction . . .[35]

Sir Robert Borden, as Prime Minister, pointed to the Commission as an outstanding example of the growth of Canada's international status.

> I pause here to say that I think the negotiation of that treaty and the establishment of the International Joint Commission was a very notable achievement in the government of Sir Wilfrid Laurier, and I am not at all sure that either the people of this country or the members of this House realize adequately the immense advantages which have resulted from the establishment of that commission.
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> . . .
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> . . . The members of the International Joint Commission do not in one sense exercise diplomatic functions, but they exercise certain functions which are very closely allied thereto.[36]

This latter statement of the Prime Minister was challenged by the press about a year later when the new Prime Minister, Mackenzie King, was seeking to replace the incumbent commissioners.[37] It was also attacked by Sir William Hearst in letters to Magrath and to the Prime Minister.

> I notice by the press that the Prime Minister suggests that the Commission is a diplomatic body. The arguments of the Right Honourable Sir Wilfrid Laurier and Dr. Pugsley in the debate on the subject in the House of Commons in 1912 in favour of the view that the duties of the Commission were judicial and not diplomatic were unanswered then and in light of experiences are absolutely unanswerable now. Undoubtedly, the Commission should be diplomatic in their conduct and tactful in their actions, but no person knows better than you do that there is nothing in the Treaty under which the Commissioners are appointed that give them any power or

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35. L.J. Burpee, "The International Joint Commission," The Round Table, No. 20, (Sept-Nov 1915), pp. 851-856; "Our North American International Court", American Review, Feb. 1916, pp. 181-184; I.J.C., Can. Sect. File E-8-10, "A Successful Experiment in International Relations", Address to the Victorian Club of Boston, Feb. 17, 1919; Papers Relating to the Work of the International Joint Commission, 1929, pp.27-42; "What is the International Joint Commission," Journal of the Engineering Institute of Canada, 1919, pp. 499-504; I.J.C., Can. Sect. File E-8-10.

36. Canada, Parliament, House of Commons Debates, Session 1921, vol. 3, pp. 2388 & 2420, Apr. 21, 1921.

37. Magrath Papers, vol. 6, file 20, Toronto Star, Jan. 31, 1922.

> authority to carry out diplomatic negotiations with the United States that would require the Government of Canada to intrust them with State secrets or information political or otherwise of a confidential character. Should the Commission ever undertake to perform duties of this character they would soon destroy their influence as Commissioners, and in any event, such duties would not be undertaken as Commissioners under the Treaty but as special envoys of the Government given direct authority in some other way by the Government of Canada.[38]

Support for Sir William's position was forthcoming from the Christian Science Monitor which took the opportunity to praise the ten years of work by the Commission, describing its functions as purely judicial, operating not as a representative of each nation but in the joint interests of the two.[39]

In the following year, after serving on the Commission for over a decade, Magrath attempted to set forth his views on the status and functions of the Commission in a letter and accompanying memorandum to C.E. Townsend who had just been appointed to the United States section.

> We have been operative for twelve years and have been able to accomplish some splendid work. The St. Mary's River dispute between Montana and Alberta, if it had been dealt with in London or Paris, with distinguished counsel on both sides, would have caused a stir equal to the Alaskan boundary question. The solution, however, was found by us at a very quiet meeting out in Montana and little or nothing was said about it. That is alright except that we are still young and if we are to measure up to the possibilities that lie before us, public opinion must get behind us as it is behind the judiciary of both countries. So far as I can see no one is doing anything toward the creation of such public opinion.
>
> President Taft I understand was disappointed when the Canadian Government failed to appoint three lawyers to the Commission, his idea being to develop it into a purely legal tribunal. As a result of our experience I am disposed to think that he was wrong. The two outstanding features of value in the Commission, as at present constituted, are that we have no umpire and that

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38. Magrath Papers, vol. 6, file 20, Letter from Hearst to Magrath, Feb. 20, 1922; Letter from Hearst to King, Feb. 25, 1922.

39. I.J.C., Can. Sect. File E-16, Christian Science Monitor, June 19, 1922.

> every issue as between the two countries is dealt with by an organization in which each is equally represented. May not the purely judicial determination of a question involve the necessity of an umpire? Judges reach conclusions based solely on their interpretation of the law. If they divide equally, as is frequently the case, it means that the question goes before another court . . . . In other words, there is no such thing as an attempt at adjusting differences. That is only possible in the quasi-judicial body such as ours.
>
> . . .
>
> . . . I am not prepared to say that it is possible to destroy the national viewpoint in members of our organization, but it is quite astonishing how one finds himself gradually moving into the middle of the road in dealing with international questions.[40]

In the accompanying memorandum he described the advantages of the Commission thus:

> . . . Anything savoring of astuteness or any special pleading for benefit of an umpire is impossible, because there is no umpire, and in view of the continuance of the work, no member can afford to lose the confidence of his associates. The impelling force in the conduct of the work is that settlements must be found and the permanency of the organization compels members to seek for decisions that will be reasonably fair to both countries. Where the dispute is at some point on the international boundary, settlements are facilitated by having the case heard in the locality. Each side hears the other and comes to realize that there are two sides to the issue. Furthermore, it is important that they see the judges, whose decision they will more readily accept, if in the conduct of the investigation in their midst, confidence is inspired in the minds of the disputants.

Enforcement of decision, he noted, is not in the hands of the Commission.

> The two countries have not created a super power to enforce the Commission's decisions. Those that negotiated the treaty realized the great danger in attempting such a thing. Public opinion in both countries is the power that will see to enforcement of the Commission's decision.

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40. Magrath Papers, vol. 5, file 19, Letter from Magrath to Townsend (personal), June 14, 1923.

Magrath concluded that the Commission had achieved concrete results and could no longer be considered an experiment.[41]

Magrath sent a copy of this letter and memorandum to the Prime Minister. King responded by asking the chairman for more detailed information on the work of the Commission, particularly for a list of matters with which the Commission might deal. He suggested that, in his view, there was no matter of difference which might arise between Canada and the United States with which the Commission could not deal. He agreed that much more should have been made of the Commission at the Versailles discussions.

> I am convinced that it contains the new world answer to old world queries as to the most effective methods of adjusting international differences and avoiding the wars to which they give rise. In some respects it constitutes the most important contribution which has thus far been made to the practical solution of international differences.[42]

Magrath quickly prepared a memorandum for the Prime Minister emphasizing the all-embracing scope of the Commission's functions. Noting the recent speech by Secretary of State Hughes to the Canadian Bar Association calling for a permanent body like the Commission to deal with all matters between the two countries, he pointed out that in his opinion the International Joint Commission already possessed such capabilities. He suggested that the only real limitation was the failure of the Government to realize that the Commission was the one place in which Canada possessed a voice equal to that of the United States.[43]

This view was seconded by Burpee who produced another series of articles on the Commission, seeking to publicize its work. In one of these, the first official handbook on the Commission, he set out in illustrative fashion summaries of the first eighteen cases handled by the Commission. Describing the nature of the Commission, he said:

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41. Magrath Papers, vol. 5, file 19, Memorandum re International Joint Commission; King Papers, vol. 90, No. 76363-76370.

42. Magrath Papers, vol. 5, file 19, Letter from King to Magrath, July 21, 1923; King Papers, vol. 90, No. 76372-76375.

43. Magrath Papers, vol. 5, file 19, Memorandum re International Joint Commission from Magrath to King, Sept. 18, 1923; King Papers, vol. 90, 76381-76385

> . . . [Its] jurisdiction is not altogether that of a court of law, nor of an umpire, nor of an investigatory body, but it combines some of the characteristics and a good deal of the spirit of all three. [44]

In letters to R.A. MacKay who was preparing a thesis on the Commission, Magrath and Hearst added several comments on the nature of the Commission. Magrath noted that it was imperative for the Commission to reach a satisfactory settlement in every matter to come before it if it were to maintain its integrity. He felt that this objective was facilitated by the Commission's decision not to retain a permanent technical staff since this obviated the danger of such personnel developing strong national views to the embarrassment of the commissioners. He further added that the Commission was not judicial in nature for it lacked the necessary umpire.[45] Hearst described the Commission as essentially an adjudicative body and consequently, one on which the commissioners must always maintain utmost impartiality.[46]

Hearst, of course, disagreed with the final observation of Magrath, and pointed out to him why he felt that the presence of an umpire on a body was not an indication of its judicial character, but rather the reverse.

> The fact that the International Joint Commission has no umpire to my mind rather adds to than detracts from its judicial character and imposes upon the members of the Commission a strong obligation to act in a judicial manner in all matters coming before the Commission for a decision. The idea of the Commission I think we both have and the one that I believe was behind the authors of the Commission is that the members of the Commission should not act as partisans representing the Government

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44. The International Joint Commission--Organization, Jurisdiction and Operation under the Treaty of January 11, 1909, between the United States and Great Britain, Washington, U.S.G.P.O., 1924 See also: L.J. Burpee, "Insurance for Peace," Kiwanis Magazine Sept. 1924; Papers Relating to the Work of the International Joint Commission, 1929, pp. 63-70; L.J. Burpee, "An International Experiment", 1923, An address to the Michigan Law School, Papers Relating to the Work of the International Joint Commission, 1929, pp. 48-62

45. Magrath Papers, vol. 5, file 19, Letter from Magrath to MacKay, June 22, 1926.

46. Magrath Papers, vol. 5, file 19, Letter from Hearst to MacKay June 22, 1926.

> by whom they are appointed and striving at all times in international disputes to secure the greatest advantage for the country appointing them, but a judicial or at least quasi-judicial body deciding the cases coming before them impartially, honestly and fairly no matter what the consequences may be to one country or the other.

Although he agreed that the Commission had more latitude in making its decisions than did a court, not being fettered by precedents and being free to make necessary adjustments as equity required, Hearst added that the rendering of compromise judgments was not unknown in judicial practice.[47]

In his paper, the first study of the Commission and the treaty prepared by someone outside of the Commission, MacKay saw the functions of the Commission as quasi-judicial (administrative and judicial), executive, investigative and arbitral. The first power encompassed matters falling under Articles III, IV and VIII; the second applied to Article VI. As for the investigative role, this related to Article IX and, with the power of recommendation, he felt the Commission was placed in a strong position of influence over public policy. MacKay thought that the arbitral power under Article X was perhaps illusory since only matters which had aroused national feeling were likely to be referred and, in such circumstances, it would be unlikely to refer a matter which would cause a split along national lines. The author suggested that there were three main reasons for the relative success of the Commission: the permanency and ésprit de corps of the commissioners, the independence of the commissioners and the simplicity and directness of the procedure.[48]

In a letter to Burpee, Magrath touched upon the solidarity of the Commission.

> You speak of our unanimous decisions. We will always have unanimous decisions, because we have got to that

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47. I.J.C., Can. Sect. File E-6, Letter from Hearst to Magrath, Dec. 27, 1928.

48. R.A. MacKay, "The International Joint Commission Between the United States and Canada", 22 A.J.I.L. 292 (1928); Papers Relating to the Work of the International Joint Commission, 1929, pp. 71-100

> point where we appreciate that if we tried to use force to get anything through--even by a majority vote--it would more or less develop a cleavage in our relations. My view, therefore, is that until everyone around the Board is satisfied it is better to keep the matter open, and unconsciously that is what has happened, resulting in unanimous decisions.[49]

In balance, the expressed views up to this point, with the exception of those of Magrath, tended to favour the concept of the Commission as essentially a judicial forum, dealing with matters much in the same fashion as a court.

C. Shifting Concepts

In the early "thirties", the Trail Smelter investigation provided an opportunity for some serious consideration of the investigatory and recommendatory roles of the Commission and to the position of the governments in relation to a report made under Article IX. Magrath had some early fears that the Commission for the first time might not submit a unanimous report. These proved to be unfounded.[50] The report, however, was not acceptable to the United States Government but it was reluctant to indicate an outright rejection. The Secretary of State explained the difficulty.

> . . . Where an international commission have reached a unanimous decision it is a very serious thing to give any appearance of hedging on it. It tends to discredit the whole system of international arbitration.[51]

The legal adviser to the Secretary agreed. Even though the report was merely recommendatory it should be given great weight unless the procedure under Article IX was to be an "idle gesture". He suggested adopting the report as a basis for negotiations

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49. Magrath Papers, vol. 5, file 19, Letter from Magrath to Burpee, Sept. 20, 1929; I.J.C., Can. Sect. File E-8-10.

50. Magrath Papers, vol. 6, file 20, Memorandum from Magrath to O.D. Skelton (confidential), Mar. 7, 1930.

51. Decimal File 1930-39, Department of State, National Archives, 711.4215 Air Pollution /400, Memorandum of Secretary of State on Conference re Trail Smelter, Mar. 27, 1931.

leading to a determination of damages subsequent to 1932.[52] The Secretary instructed the legation in Ottawa to take up this proposal with the Prime Minister, noting that

> . . .[t]he Government of the United States shares with the Government of Canada a certain pride in the helpful work of the International Joint Commission since its establishment, and this feeling has impelled me to regard the report of February 28, 1931, as a recommendation which, while not satisfactory to the injured parties in the United States, is entitled to the most serious consideration of this Government.[53]

Canada agreed to negotiate a settlement on the basis of the Commission report,[54] but was very critical in private of the United States' attitude toward the Commission's unanimous report. The Under Secretary of State for External Affairs felt the United States' position unwarranted.

> . . . The mode of settlement--reference to the International Joint Commission-- was one of their seeking and seeing that the three United States members, who not ordinarily take a particularly international point of view, joined with the three Canadians in a unanimous recommendation, the recommendation should not lightly be disregarded. Such action is a black eye for the Commission and for the principles of conciliation which they are to establish and maintain.[55]

The Canadian minister in Washington agreed that the United States was

> . . . repudiating its own members of the International Joint Commission, and the prestige of the Commission is bound to suffer . . . .[56]

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52. Decimal File 1930-39, Department of State, National Archives, 711.4215 Air Pollution/408, Memorandum from Hackworth to Stimson, Dec. 27, 1932.

53. Decimal File 1930-39, Department of State, National Archives, 711.4215 Air Pollution/407B, Note from Stimson to U.S. Legation, Ottawa, Feb. 10, 1933.

54. Decimal File 1930-39, Department of State, National Archives, 711.4215 Air Pollution/414, Telegram from Boal, U.S. Legation to Hull, Mar. 1, 1933.

55. Canada, Department of External Affairs, File 103-34, Note from Skelton to Herridge, Canadian Legation, Feb. 2, 1934.

56. Canada, Department of External Affairs, File 103-34, Note from Wrong, Canadian Legation, to Skelton, Feb. 13, 1934.

The Prime Minister sent a strong note to the United States legation

> The parties concerned are not merely those immediately interested in the solution of the present problem. The people of both countries are concerned to maintain and extend the established agency for the solution of boundary disputes. The United States has long held a foremost place in the advocacy of international arbitration. Through the conclusion and execution of the Boundary Waters Treaty it has cooperated in building up on the North American continent one of the most distinctive and significant experiments in this field. The International Joint Commission . . . is an embodiment and an instrument of our common standards of neighbourly intercourse. I am sure your Government will agree in that it would be calamitous to weaken the position of the Commission and imperil the future of this North American experiment by rejecting outright, save upon grave and plainly evident grounds, its unanimous recommendation upon any question.[57]

The United States persisted, however, and when, on introduction of the Trail Smelter Arbitration Treaty in the House in 1935, the Prime Minister was asked why the Commission was not given the matter under Article X, he replied:

> I believe it is only necessary to say that the United States was not prepared to accept the International Joint Commission as the tribunal to deal with the matter. Perhaps it will be recalled . . . that it was agreed between the two nations that the conclusion arrived at by the International Joint Commission with respect to damage up to January 1st, 1932, would be advisory, rather than in the nature of a judgment.[58]

Meanwhile, differing views as to the general nature of the Commission continued to be voiced. Chacko, in the first major treatise on the Commission, felt that it was basically judicial in nature but possessed significant investigative and administrative powers.[59] The United States commissioners agreed in part. John H. Bartlett, the chairman, felt that

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57. Canada, Department of External Affairs, File 103-34, Note from R.B. Bennett to Robbins, U.S. Legation, Feb. 17, 1934.

58. Canada, Parliament, House of Commons Debates, Session 1935, vol. 4, pp. 3453-3456, June 10, 1935.

59. Chacko, C. Joseph The International Joint Commission Between the United States and Canada New York, Columbia University Press, 1932.

> . . . generally speaking, this is a fact-finding commission, and I have come to the belief that the most valuable function of the commission, as supplementing the work of diplomacy, exists in the fact that the treaty gives the commission, consisting of three judges from each country, the power to summon witnesses of both countries and cross-examine them in order to get the facts, which tend to reduce the distance between the conflicting allegations before them in any diplomatic negotiation; whereas under the other system without a fact-finding commission each side began its diplomatic negotiations with a wide chasm between the facts as alleged.

P.J. McCumber saw the duties as

> . . . such a mixture of judicial, administrative and diplomatic phases that it would be fatal to go into a hearing and thence into executive session and diplomatic discussion unless we could know all about the case in its preparation and development--that is, all that could properly be known from the American standpoint.

And, as to the continuing need for the Commission:

> If one should venture to suggest that the treaty should be abrogated . . . it must then be understood that the rights of the nationals along the border must be preserved and that agencies must be in some way maintained to preserve their rights and to settle differences that may arise with reference to possible future cases. It would seem to be the latest development of civilization that these international differences should be settled judicially on fact, rather than by diplomacy. But as a matter of expense we believe it is cheaper to maintain the judicial attitude toward these questions than to abandon such a policy and go back to the method of handling them by arbitration through departmental bureaus.[60]

Burpee re-emphasized the indivisible international character of the Commission in preparing an answer to a question in the Senate as to why the Canadian section did not file an annual report with Parliament.

> The Commission does not prepare annual reports since this would be out of character with it being an international body. This was decided when Mr. Casgrain was Canadian Chairman. It would be inconsistent with one of the basic principles governing the work of the Commission, which was that the two Sections, Canadian and United States, should under no circumstances

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60. United States, Congress, 72d Congress, 2d Session, 1933, Hearings of the Subcommittee of the House Committee on Appropriations.

> function separately but should act as one complete tribunal.[61]

J. M. Callahan in a book on Canadian-American relations stressed the judicial role of the Commission. Describing it as a "permanent international commission tribunal" to which "individual citizens of either country might present cases directly, instead of indirectly through their governments", he felt that the Boundary Waters Treaty

> . . . marked a notable advance in international arbitration. For the contentions and delays of diplomacy it substituted an international judicial tribunal which might be used both as a means to promote joint economic interests and as an agency to promote peace by conciliation, and which represented the hopes of Root and Bryce to dispense with the Hague tribunal in the decision of questions between the United States and Canada. It also reflected an advance in the diplomatic status of Canada.
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> . . .
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> . . . Immediately after the first meeting of the International Joint Commission it became a constant medium for direct communication to settle questions at issue between the two neighbors and to prevent disputes by amicable and impartial judicial methods. It blazed a new trail for the judicial settlement of international disputes.[62]

Others placed greater emphasis on the investigation and conciliation functions of the Commission. This was particularly the view of Mackenzie King, reflecting perhaps his wide experience in the settlement of labour disputes. Speaking in 1938, he said of the Commission:

> . . . It was created to adjudicate all questions of difference arising along our four thousand miles of frontier. In the quarter of a century of its existence, by substituting investigation for dictation, and conciliation for coercion, in the adjustment of international disputes, the Commission has solved many questions likely to lead to serious controversy.[63].

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61. Canada, Department of External Affairs, File 45-34, Returns to Parliament, June 26, 1934.

62. Callahan, James Morton American Foreign Policy in Canadian Relations New York, Macmillan & Co., 1937, pp. 506; 538-539.

63. W.L. Mackenzie King, "The Bridge-Builders", Ottawa, King's Printer, 1938; I.J.C., Can. Sect. File E-16.

The Ottawa Citizen too, espoused this view of the Commission.

> The International Joint Commission record could be cited as an example of the soundness of the plan of conciliation where the parties immediately concerned set out to settle differences between themselves, without bringing in any third party to act as arbitrator. Cooperation is found along this path of conciliation. It could be extended with advantage to other countries, as it surely must be in the march of civilization towards the course of law above the law of force.[64]

As to the arbitral role of the Commission under Article X, the general feeling seemed to be that such activity would be out of character for the Commission -- despite its judicial character. Percy Corbett thought that

> . . .[i]t is doubtful whether any use will ever be made of Article X. The International Joint Commission has shown admirable competence in dealing with questions of a technical nature relating to water levels and the measures necessary to preserve them against unreasonable obstruction or diversion. But it can scarcely be said to have been manned with a view to the legal solution of disputes which diplomacy has proved incapable of settling.[65]

John Read felt

> . . .[t]he real difficulty with the use of the Commission for arbitrations generally is not any defect in the existing personnel. The basic difficulty is that a tribunal of even numbers is unsuitable for a strongly contested case. This is particularly so when there are no neutral members of the tribunal.[66]

Surprisingly, Read subsequently, but in another context, suggested that the Commission was

> . . . fundamentally a judicial tribunal acting as an arbitral body, and as a mediator between the governmental agencies in Canada and the United States. Its usefulness depends upon its preserving its position as

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64. Ottawa Citizen, Jan. 12, 1937; I.J.C., Can. Sect. File E-16.

65. Corbett, Percy E. The Settlement of Canadian-American Disputes New Haven, Yale University Press, 1937, pp. 116-119.

66. I.J.C., Can. Sect. File E-8-10, Letter from Read to Burpee, Nov. 9, 1938.

> a dignified international organization. I should be the last to want to see it develop into a legalistic court. On the other hand, there is a middle ground between the legalistic conception of a court and an administrative agency.[67]

The commissioners, too, continued to ponder the role of the Commission. To chairmen Stewart and Stanley, Hearst expressed his concern over the lack of solidarity within the Commission.

> . . . If I may be permitted to say so there appears to me to be a tendency in later years to divide the Commission into two parts rather than to work together as one body. This . . . is a mistake, and one that should be resisted as far as possible. The Commission, as I look upon it, is not made up of two parts, but of one organization, and should work together as closely as possible.[68]

Stanley agreed.

> . . . The fact that we are or should be one court, not two separate sets of diplomats each with an eye single to some advantage accruing to its own country, is a thing that distinguishes us from the arbitral boards which formerly attempted the adjustment of differences between the two countries, usually to the dissatisfaction of one or the other country, and often to both.
>
> In my opinion the usefulness of this body, its claim to distinction and for that matter to life, depends upon the capacity of its members to sit as judges not as nationals.[69]

Magrath, even in retirement, held to his early view of the Commission, although he thought that it might change.

> . . . I am aware that there are some who have held in recent years that the International Joint Commission should be a great judicial body. That may come in time, but the rigidity of the Law Court, with the power of the State behind it to enforce its decisions, is still some distance beyond our horizon, so far as attempting to bring out any international cooperation of that character.[70]

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67. Canada, Department of External Affairs, File 2492-D-40, Memorandum from Read, Legal Counsel to the Under Secretary of State, Dec. 29, 1939.

68. I.J.C., Can. Sect. File E-16, Letter from Hearst to Stewart, Oct. 7, 1940.

69. I.J.C., Can. Sect. File E-16, Letter from Stanley to Hearst, Oct. 17, 1940.

70. Magrath Papers, vol. 6, file 20, Foreward to the International Joint Commission Album, prepared by Magrath, May 1938.

D. Other Considerations

In the 1940s, an interesting question arose concerning the role of the Commission in references under Article IX and, specifically, whether the Commission could or should be used by one government to force the other into a course of action which it may be reluctant to pursue.

The question of procedure for submitting references to the Commission was raised early by the United States with the Lake of the Woods reference in 1912. The Secretary of State suggested to Bryce that since both countries had an equal interest in the questions to be submitted, "it would probably be the wish of the Government of Canada that they should be brought before the Commission at the joint request of both Governments." However,

> . . . [s]hould Canada see any objection to that the United States would be quite prepared to make the request on their own behalf only pursuant to the provisions of the Treaty which permit either party to bring a matter before the Commission . . . [71]

The Canadian Government, without disputing the interpretation of the Article by the State Department, concurred in the proposal that the reference be made jointly.[72]

Thus began the unbroken practice of references under Article IX being made on the joint initiative of the two governments. This, despite the interpretation of the provisions by the State Department, a construction favoured by most legal writers at the time. Indeed, in the view of one, not only could one government make a reference to the Commission but a government could even make a reference to its own section of the Commission for report and recommendation.[73]

Later writers such as Chacko and MacKay found the interpretation otherwise, perhaps fortified by the evidence of

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71. Confidential Prints, International Boundary Waters, vol. 1, p. 241, Despatch from Bryce to the Duke of Connaught, Apr. 24, 1912.

72. Confidential Prints, International Boundary Waters, vol. 1, p. 247, Privy Council Minute, June 6, 1912.

73. "Boundary Waters Treaty Between the United States and Canada", 4 A.J.I.L. 668 at 672 (1910).

practice by the governments in the intervening years. Chacko's view was that although either government could request the other to join in a reference, neither could so direct the Commission without the concurrence of the other.[74] MacKay agreed, observing that the rationale was "obviously to prevent either government from using the Commission as a means of prying into the domestic concerns of the other."[75]

Nevertheless, Stanley was not deterred by practice or theory from suggesting that unilateral action by one government under Article IX was both desirable and justified.

> . . . If I may, I shall take advantage of this occasion to call to your valued attention another matter of prime importance which in time past has caused much unnecessary delay to the proper functioning of this body and has been the occasion of much wasted effort on the part of the State Departments of both countries -- that is, the unwarranted assumption . . . that when either country seeks the advice of this Commission upon any controverted matter that it is obligatory upon the country receiving such request under Article 9 of the Treaty, to carefully analyse every phase of the proposal in order to determine the wisdom or propriety of the proposal as an abstract proposition and thereafter to act accordingly, by approving or disapproving, as the case may be.
>
> It is my fixed and long considered opinion that this treaty is not capable of any such interpretation and that the repeated delays occasioned by it are derogatory to the dignity and tend to impair the usefulness and efficiency of this body . . . .
>
> It appears to be to me perfectly manifest that it is the plain intent of Article 9 to place the services of this Commission, whenever either country seeks to have it "examine and report" upon any controverted matter, and that whenever one country makes such a request, in conformity with the provisions of this Article, it is obligatory upon the other to accede to such request.
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> . . .
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> Since by the explicit terms of this Article, the powers of the Commission are strictly confined to an "examination and report" to the two governments concerned, and can never be treated or considered as a final determination of any question of law or fact, neither government need by

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74. Chacko, C. Joseph The International Joint Commission Between the United States and Canada New York, Columbia University Press, 1932, pp. 241-245.

75. R.A. MacKay, "The International Joint Commission Between the United States and Canada", Papers Relating to the Work of International Joint Commission, 1929, p. 71 at 88.

> apprehensive of any premature or injudicious determination of any matter vitally affecting the welfare or security of either country, this Article providing explicitly that "such reports of the Commission shall not be regarded as decisions . . . .
>
> Our Commission, I am sure, recalls with genuine gratification that both of those learned and accomplished jurists . . . John E. Read and Green H. Hackworth . . . were disposed to concur in [this view] and that accounts in great measure for the admirable celerity with which such references were handled during their capable administration of such affairs . . . .

Stanley concluded by suggesting to Perrault that the Commission urge the two governments to immediate action on the proposed Souris reference.[76]

Perrault felt that Stanley's views were in accord neither with the actual wording of Article IX nor with the consistent practice before the Commission. But

> . . .[s]upposing that your interpretation is right, do you not think that the procedure and the modus vivendi which were adopted during more than thirty years by our two governments is in line with the aim and spirit of the 1909 treaty, and is conducive to entertain friendly relations and understanding? And, as a consequence, is it advisable to change this interpretation of Article 9 and this procedure?[77]

Burpee, however, advised Perrault that the Commission had never taken the position that it was necessary to have the concurrent action of both governments and that such action was not dictated by Article IX. Prior discussion and agreement on a joint reference were adopted merely as a matter of courtesy. "I do not recall any authority in international law who has discussed the meaning of the treaty taking the ground that under Article 9 both Governments must concur in the reference."[78]

Despite further lobbying by Stanley,[79] the disruptive

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76. I.J.C., Can. Sect. File F-2-7, Letter from Stanley to Perrault, Aug. 23, 1946.

77. I.J.C., Can. Sect. File F-2-7, Letter from Perrault to Stanley, Sept. 4, 1946.

78. I.J.C. Can. Sect. File F-2-7, Letter from Burpee to Perrault, Sept. 4, 1946.

79. I.J.C., Can. Sect. File F-2-7, Letter from Stanley to W.R. Vallance, Assistant Legal Adviser, July 10, 1947.

practice which he advocated has never been adopted by the governments and, in consequence, the Commission enjoys the confidence of both parties in undertaking its investigations and in reporting thereon.

Returning to the more general observations on the role of the Commission, the Minister of External Affairs in 1946 felt that the juridical qualities of the Commission could be adopted for the settlement of boundary questions in other countries. Addressing the Italian Political and Territorial Commission on the determination of the Italo-Yugoslav boundary, he said:

> We in Canada know how fortunate we are in having a frontier which acts not to divide the two peoples but to link their common interests yet it would be a false rendering of history to say that there have never been difficulties between Canada and the United States arising out of our common frontier. There have been frictions and real conflicts over the past century. The significant point, however, is that to deal with such disputes the two countries have worked out orderly and judicial processes through the International Joint Commission. The International Joint Commission is a permanent judicial organization composed of three members named by the Canadian Government and three by the United States Government . . . .
>
> . . . The Canadian delegation is fully aware of the fact that the procedures which have been evoked to deal with our own frontier can hardly be automatically applied in areas of postwar Europe which are still so near the immediate consequences of the last great conflict. Such procedures presuppose the establishment of normal economic relations and of an atmosphere of mutual confidence between the neighbouring states. We are convinced, however, that whatever the final frontier settlement that may be reached, a durable peace in this area can only be secured through the establishment of judicial procedures for the settlement of frontier difficulties as they arise.[80]

George Brown also found many features of the Commission to commend its adoption to others. Discussing a number of the Commission's dockets, he concluded:

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80. I.J.C., Can. Sect. File E-16, Excerpt from a Speech by the Hon. Brooke Claxton, Sept. 19, 1946.

> These examples may serve to illustrate not only the nature of the Commission's work, which has combined in a practical way the functions of judge, administrator, and arbitrator, but also some of the reasons for the Commission's success . . . This success has been based on a number of factors: the tradition of mutual confidence built up gradually between the two countries, the determination of the Commission's members to make its work a success, the development of effective procedures, and the constant effort to reach practical, fair and reasonable conclusions. The Commission has displayed remarkable unanimity in its opinions and has by all these means established its prestige. Its informal but thorough methods of obtaining opinion and evidence, and its practice of holding hearings, when advisable in the locality of the problem have developed public confidence in its integrity. Perhaps its greatest contribution to peaceful settlement has been that it has dealt with matters involving conflicting interests before they got to the stage of international bitterness.
>
> . . .
>
> While the work of the International Joint Commission has been limited in scope, and while it has not involved any restriction in national sovereignty . . . it has nevertheless provided an example, and pointed the way to methods which are capable of far-reaching application in international affairs . . . [81]

E. New Concepts

It is only within the last two decades that any pronounced recognition has been given to the fact that the dominant character of the Commission was perhaps not so much judicial as it was investigative and advisory. This shift in view was attributable, possibly to a number of factors: the increasing ratio of references to applications, the simple magnitude of the various international matters coming before the Commission and, not the least, the personalities of some of the men who served as commissioners during this period. Whatever the reasons, the responsible officials of the two governments found it necessary

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81. Brown, George W. The Growth of Peaceful Settlement Between Canada and the United States (C.I.I.A. Contemporary Affairs) Toronto, Ryerson Press, 1948, pp. 26-31.

to give some consideration to the basic character and role of the International Joint Commission. Views on the matter have also been expressed by some members of the Commission and, of course, writers and speakers have continued to assess and reassess the nature of the Commission. As before, not all of the views are compatible.

Appearing as a witness before the External Affairs Standing Committee in 1950, the Minister read a lengthy paper on the work of the Commission in which he characterized its principle function as advisory.[82] This view of the Commission was, not surprisingly, reflected the following year in the monthly bulletin of the Department of External Affairs, where scant mention was made of the juridical nature of the Commission but considerable detail of the reference procedure was given with accent on the consultative and advisory role of the Commission.[83]

The Canadian chairman, General A.G.L. McNaughton, appearing for the first time before a parliamentary committee, also paid particular attention to the "advisory" role of the Commission in providing guidance for the two governments in the international development of water resources. He made no mention of the judicial powers and, in fact, suggested that the proposal in 1921 to vest the Commission with powers of enforcement would have been completely out of character for the Commission. Dealing with a question on the resolution of differences within the Commission, he felt that these were worked out through "patience, reason and fairness" on both sides. In specific comment on the Red River reference, he noted that "[t]he principal concern of the IJC from the Canadian viewpoint is to insure that nothing done in the United States will aggravate the situation in Canada."[84]

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82. Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, Session 1950, June 3, 1950.

83. "The International Joint Commission", 3 External Affairs 90-95, (March 1951).

84. Canada, Parliament, Senate, Committee on Banking and Commerce, Minutes of Proceedings and Evidence, 21st Parliament 6th Session, June 25, 1952.

The more interesting role which the General saw for the Commission was set out in part in a memorandum prepared in 1953. He was seeking to persuade the Department of External Affairs that orders of the Commission under Article VIII, although perhaps not strictly within the terms of the Article, were nevertheless quite valid.

> In practice the Commission is much more than just an international court. It is in some sense a part of the diplomatic machinery of the two countries, created to carry out the purposes stated in the preamble to the Treaty of 1909: ". . . to make provisions for the adjustment and settlement of all such questions as may hereafter arise . . ." . . . .

Noting that the orders of the Commission reflected the specific rule of the treaty and also the general intention of the parties to the treaty, he went on:

> . . . This has helped to make the Treaty of 1909 a flexible basis of agreement, rather than a rigid, inflexible document requiring frequent formal amendment and clarification by the two Governments in order to be appropriate for specific cases and to keep it abreast of current developments. The authors of the Treaty could not have foreseen in 1909 the full scope of the developments which have since taken place and which will take place in years to come along the boundary between the two countries, developments which need of course to be effected in accord with the intent and general terms of the Treaty but not necessarily confined within the provisions of a particular clause which may not prove entirely appropriate as written but which are within the authority of the High Contracting Parties to modify by consent. Experience shows that the authors planned well in providing for the creation of a body like the International Joint Commission to deal with specific problems within the framework of the general principles and rights laid down in the Treaty.

Noting that whenever the Commission departed from the "strict legalistic procedure" in interpreting Article VIII from time to time it had always been encouraged by counsel for the governments, McNaughton suggested that it might be wise, when the Commission did go beyond the legal limits of the Article, for the governments to formally express agreement. In conclusion, the General cited the Waneta Dam and St. Lawrence Power orders

by the Commission as examples of the Commission operating quite properly as a "forum of negotiation" rather than as a court, and thus coming up with an order acceptable to all though not strictly within the provisions of Article VIII.[85]

Burbridge was not in total agreement with the General's view of the Commission's role.

> In my view, the Orders of the Commission are in the nature of and have the status of, authoritative interpretations of the Treaty and authoritative definitions of the rights and obligations involved therein. The conditions, written into the Commission's Orders of Approval, pursuant to the rules or principles enunciated in Article VIII of the Treaty, relate to the practical steps which must be taken to preserve the rights, obligations or interests which the Treaty is designed to protect. This does not mean, in my view, that these conditions can be such as to alter these rights, obligations or interests.

He did agree, however, that the Commission was more than a court. "It is able to approach the problem more from the practical than the strictly legalistic point of view and its success and value depends on such an approach."[86]

E. A. Coté in a talk to Heads of Divisions also felt that the Commission's flexibility, which could never be achieved in a court, was the prime virtue of the Commission. Reviewing the work of the Commission in the past, the present matters before it and the possible work for the future, he offered the following observations:

> The first is that though the Commission's work is not spectacular it is of prime importance to Canada and the United States.
>
> The second conclusion is that its work is successful largely because it is not too much before the public eye. When citizens of either country have a cause of complaint and bring them before the Commission, the

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85. Canada, Department of External Affairs, File 2492-40, Confidential Preliminary Draft on International Recognition of Water Rights in Streams Crossing the Boundary, submitted by McNaughton to Burbridge, Legal Devision, Feb. 10,1953.

86. Canada, Department of External Affairs, File 2492-40, Letter from Burbridge to McNaughton (personal and confidential) Mar. 18, 1953.

> very act of bringing of them to the Commission helps take the steam off the case. It can then be studied very rationally and a solution can be arrived at which is usually satisfactory to all concerned.
>
> Another conclusion is that the interests of Canada and the United States in boundary matters will be served in direct ratio to the ability, intelligence and wisdom of the Commissioners appointed.

Finally, noting the increasing demand for water in both countries, he suggested that it was imperative that equitable arrangements be worked out to protect both countries' resources.

> . . . The International Joint Commission is probably, set as it is in the diplomatic framework of both countries, as flexible and as useful an instrument as could be devised to ease tensions along the boundary waters and to solve their attendant problems.[87]

In 1955 and 1956, McNaughton made extensive appearances before the External Affairs Committee. In dealing with the Columbia River reference, he made it clear that the Commission had a dual role. While it was charged with developing plans of water resource development which were mutually beneficial to both countries, each section was responsible for guarding and preserving the interests of its own nation. The goals of each role, it seemed, might not be mutually compatible, in which case it was the function of each section to advocate that which best benefited its country. The role of the Commission and its sections, however, was purely investigatory and recommendatory, and thus the initiative for action rested with the governments. As to the differences of opinion which had developed in the Commission over the Columbia River reference, the General explained the positions of the Commission and the governments as he saw it.

> The differences have been sharp and they should be sharp because I think that people should realize that under this treaty tremendous and far reaching responsibilities have been given to this commission. We are in fact set

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87. Canada, Department of External Affairs, File 2492-D-40, Outline of Talk to Heads of Divisions by E.A. Coté, United States Division, Jan. 18, 1954.

> up as an equally constituted body to arrive at the equitable and best use of the most important resource which the two countries have along the boundary that is, water. Out of our recommendations have got to come proposals which will divide this resource fairly for the benefit of the two countries down the years and in perpetuity. That is a tremendous responsibility. It is not to be expected that there will not be sharp differences of opinion, and it is not to be expected that you won't need on occasion to use what the drafters of the treaty foresaw--that the governments themselves will have to pick up a difficulty and go into it by diplomatic means and to tell us, on a particular point, what the answer is that they are agreed upon. We, in due course, will salute and say "That is that! That settles that point and we will get on with the rest of it." There is no other way by which these things can be ironed out.
>
> We are going to have sharper and more acute differences but not because of any deterioration of relations between our two countries; that does not exist--but because of the increasing awareness that water is the limiting factor in the development of civilization on the North American continent itself. There is only a limited amount of water and we cannot afford to let any of it go unless it is equitably and precisely apportioned. We have got to maintain--our section has got to maintain the claims of this country and to do the best we can with them always and in all fairness.[88]

The Chairman of the United States section seemed to share the General's view of the Commission's dual role. In a speech in 1955, he said that it was his duty "along with my two colleagues to safeguard the interests of the United States in our dealings with Canada over boundary waters and rivers which cross the boundary."[89] And, in a later appearance before two committees of the United States Senate, he emphasized the essentially advisory role of the Commission.[90]

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88. Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 22d Parliament, 2d Session, March 10, June 1 & 7, 1956.

89. I.J.C., Can. Sect. File E-8-2, Len Jordan, Address to the Oregon Farm Bureau Federation, Salem, Nov. 15, 1955.

90. I.J.C., Can. Sect. File F-1-2, Len Jordan, Statement before the Senate Committees on Interior and Insular Affairs and Foreign Relations, Mar. 22, 1956.

The status and role of the Commission was never brought more sharply in focus, particularly in Canada, than when the decision was taken to pursue the Columbia River negotiations at the governmental level. This decision raised the question of whether or not the commissioners or any of them should have a place in the inter-governmental discussions. The background to the decision also raised the matter of trying to delineate the scope of the Commission's considerations when it was given a reference.

In suggesting that the Canadian Government seek direct negotiations with the United States, the Minister of Northern Affairs stated clearly that he felt the realm of the Commission was the practical, not the political. Engaging in the latter was the cause of the present impasse between the two sections.

> Apart from the difficulties that are presented by the publicity that has attached to exchanges in the Commission, it seems to me that the question of downstream benefits and the problems relating to discussions of fundamental questions of policy on which discussions to arrive at solutions of principle have to occur first on a direct government-to-government basis. The International Joint Commission has been able to deal effectively with problems relating to boundary waters because the principles were worked out in advance and incorporated with clarity in the Boundary Waters Treaty. The reason, I think, that it has been impossible to deal successfully in the Commission with recent questions of benefit-sharing in the case of rivers that cross the boundary is because the problem of downstream benefits has not been settled at all as between the governments and the position under Article II with regard to diversion leaves a great many unanswered questions. I think that only the two governments can negotiate as to acceptable arrangements for the respective national points of view on the problem of downstream benefits, and only the Government of Canada can consider how far, if at all, it should modify its position with regard to rights to divert and the character of compensation. Only the two governments also can settle the points unanswered in the Treaty, and to what constitutes a downstream appropriation which gives a right to compensation when a diversion takes place . . . . They are questions of high policy of the kind that should, I think, be settled directly between the governments.

As to the question of the Commission's participation in subsequent developments, Lesage emphasized that there should be no indication of a slight to the Commission in proceeding with direct negotiations and that he felt the Canadian chairman should participate fully in any inter-governmental discussions.[91]

Anticipating the proposal from the Minister of Northern Affairs, the Under Secretary of State had prepared for his Minister a memorandum on the matter of diplomatic negotiations. In it he dealt with the question of participation by the Commission.

> One question which requires early decision is whether the Commissioners of the IJC should be members of this delegation. Their knowledge and experience in the matters under discussion would be of great value. On the other hand, there might be a conflict of interests between their status as Government representatives and as Commissioners serving in an international quasi-judicial capacity on the IJC, particularly with respect to the Columbia River reference. Another consideration is, of course, that the Chairmen of the two Sections have taken strongly opposed positions in public with respect to the matters under discussion, and this fact might start off the discussions in an undesirable atmosphere.

Leger also pointed out the possibility that the governments might decide to refer subsequent questions relating to the Columbia to the Commission for examination, recommendation or implementation and, the Commissioners would then be placed in an untenable position if they had been associated with or committed to the stands taken by the parties. On the other hand, difficulties might arise if the chairman of the Canadian section were not included. The Minister indicated that, personally, he felt the General should be included in any discussions.[92]

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91. Canada, Department of External Affairs, File 5724-40, Letter from Jean Lesage to L.B. Pearson, (confidential), Feb. 3, 1956.

92. Canada, Department of External Affairs, File 12355-40, Memorandum from Leger to Pearson Re Composition of Delegation for Diplomatic Talks (confidential), Jan. 17, 1956.

The Minister of Trade and Commerce agreed that the policy questions could never be settled by the Commission and suggested formation of a Cabinet Committee to consider the possibility of proposing to the United States that "a special tribunal be established to deal with this one matter."[93] To this proposal, the Under Secretary of State for External Affairs advanced the following objections. 1. It would take long negotiations to set up such a body. 2. It would be objectionable for Canada to appear before such a body to defend its rights under Article II. 3. The IJC already existed for such purposes. 4. The new body would be no more private than the IJC insofar as the discussions were concerned. 5. If the new body were to be arbitral, it would be undesirable to have Canada's interests decided by such a body.[94]

While the Minister of External Affairs was cautious about proposing immediate negotiations with the United States,[95] the Cabinet approved the suggestion of Lesage, agreeing that the Commission's role was not to fill in gaps in the Boundary Waters Treaty relating to downstream benefits and diversions but merely to interpret the provisions spelled out therein.[96] The Canadian Ambassador in Washington was not certain that a proposal for negotiations would be immediately acceptable to the United States, but he agreed with the need for removal of the matter from the purview of the Commission.

> . . . The conclusion that I am inclined to draw at this point is that the IJC although competent, is not the best channel for negotiating these basic issues of principle and policy on which the two governments have not yet agreed.[97]

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93. Canada, Department of External Affairs, File 12355-40, Letter from C.D. Howe to Lesage (confidential), Feb. 6, 1956.

94. Canada, Department of External Affairs, File 12355-40, Memorandum from Leger to Pearson (confidential), Feb. 13, 1956.

95. Canada, Department of External Affairs, File 12355-40, Letter from Pearson to Lesage (confidential), Feb. 17, 1956.

96. Canada, Department of External Affairs, File 5724-40, Memorandum from Lesage to the Cabinet, Feb. 22, 1956; File 12355-40, Despatch from External Affairs to Canadian Embassy, Washington (Secret) Feb. 24, 1956.

97. Canada, Department of External Affairs, File 12355-40, Telegram from A.D.P. Heeney, Canadian Embassy to External Affairs (confidential), Feb. 27, 1956.

The chairman of the Canadian section favoured top-level governmental negotiations but did not see the objective as "filling in gaps" in the treaty.[98] He defended the publicity attached to the Commission discussion of the Columbia River as a legitimate part of the Commission's role.[99]

Following some preliminary approaches, including a meeting between the Prime Minister and the President in March, it was publicly announced that the two governments would undertake a discussion of international water problems; meantime, the Commission would continue its studies of the water resources of the Columbia.[100]

In the United States, Senator Neuberger publicly welcomed the announcement of governmental negotiations, pointing out that he had frequently criticised these negotiations being left in the hands of the commissioners. He felt that if the commissioners were to carry on what he saw as "foreign service activities" such as the Columbia River negotiations, then he would insist that the American commissioners be confirmed by the Senate.[101]

In the autumn of 1956, the Under Secretary of State advised against the Commission being allowed to delve into policy matters on the Columbia now that the Cabinet Committee had taken a position, and recommended that, if anything, the commissioners might be brought into the policy committee but on a consultative basis only.[102]

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98. Canada, Department of External Affairs, File 5724-40, Report of the Advisory Committee on Water Use Policy, Feb. 28, 1956.

99. Canada, Department of External Affairs, File 12355-40, Memorandum from McNaughton to Pearson (confidential) Mar. 5, 1956.

100. Canada, Department of External Affairs, File 5724-40, Memorandum from Lesage to the Cabinet, Mar. 2, 1956; Telegram from External Affairs to Canadian Embassy, Mar. 12, 1956; Press Reports, Mar. 28, 1956; Telegram from Canadian Embassy to External Affairs, Apr. 25, 1956; Statement in the House by Jean Lesage, May 23, 1956.

101. Congressional Record, 84th Congress, 2d Session, vol. 102, part 5, pp. 7053-7054, Apr. 26, 1956.

102. Canada, Department of External Affairs, File 12355-40, Memorandum from Leger to Pearson (confidential), Oct. 23, 1956; Memorandum from Leger to Pearson, Dec. 18, 1956.

When, after the change of administrations in 1957, it seemed that the new government might abandon the governmental negotiations, returning the discussions to the Commission, the Under Secretary strongly advised against such a course of action. The members of the Commission were not selected for their abilities to negotiate since the Commission was a quasi-judicial body designed to make recommendations to the governments on specific problems. The Commission had never been used to negotiate treaties and such a move would constitute abandonment of its impartial, quasi-judicial position. Further, in the United States, the members were selected from the federal service and were not responsible to the State Department as negotiators must be.[103]

In further memoranda the following May, the Under Secretary set out at length the objections to allowing the Commission to carry on the negotiations relating to the development of the Columbia River.

> 12. Another point which may require clarification is the status of the International Joint Commission. From the records, it is clear that the intention was that Commissioners should act in a quasi-judicial capacity and not as advocates for the government which appointed them . . . . Undoubtedly Commissioners will have a national bias and be alert to ensure that the interests of their own country are adequately protected; but there is a clear distinction between this situation and one in which the Commissioners are witnesses, advocates, and negotiators on behalf of their own countries as well as quasi-judicial functionaries purporting to make objective recommendations to governments. In the latter situation the integrity of the Commission is compromised and their recommendations are invalidated ab initio. Accordingly, if an argument between governments is to be worked out within the framework of the International Joint Commission, counsel for the respective governments, and not the Commissioners, will put forward government views and conduct negotiations, albeit under the good offices of the Commission.

With reference to the Columbia negotiations, he noted the stalemate within the Commission since 1954.

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103. Canada, Department of External Affairs, File 5724, Memorandum from Leger to the Minister (secret), Nov. 14, 1957, Memorandum from Châtillon to Cleveland (secret), Dec. 27, 1957.

> . . . It is obvious that no progress can be made in the Commission until the two governments agree upon a formula for compensation by the United States in return for certain action by Canada. There is no unresolvable dispute over engineering matters. In order to take some step to get consideration of the application [for Libby Dam] in the Commission, the United States is seeking through diplomatic channels [United States submitted an aide-memoire on April 22, 1958 urging negotiations] to reach an agreement with Canada on the formula which both might agree should be applied in the International Joint Commission in dealing with the application.
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> . . .
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> 14. The foregoing paragraphs suggest that the questions of policy involved in this regard cannot be resolved by an independent Commission--even an important one like the IJC. Such questions of political policy inevitably have to be dealt with at the highest level, through governmental channels, and, if experience provides any indication, in non-public negotiations.

Leger deplored any decision which would direct discussions on the Columbia through the Commission.[104]

In November the arguments against the Commission carrying on diplomatic negotiations were reiterated by the new Under Secretary.

> . . . Such a decision should be discouraged as it would appear that the Canadian Government would be seeking to delegate responsibility in making policy on international affairs to a bi-national, independent, semi-judicial body constituted for other purposes. Furthermore, although the Commissioners are undoubtedly alert to insure that the interests of their own country are adequately protected, their integrity and the value of their future decisions can be invalidated if on one particular occasion they act as advocates and negotiators as well as quasi-judicial functionaries at the same time.[105]

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104. Canada, Department of External Affairs, File 5724, Memorandum from Leger to the Minister (confidential), May 12, 1958; Memorandum from Leger to the Minister (secret), May 29, 1958.

105. Canada, Department of External Affairs, File 5724-1-40, Memorandum from N.A. Robertson to the Minister (secret), Nov. 4, 1958.

The Under Secretary of State fully approved of the reference to the Commission of the problem of coming up with principles of equitable apportionment, noting that these would be purely recommendatory and hence, in line with the role of the Commission.[106]

Following the press publicity attendant on the Columbia River negotiations within and without the International Joint Commission, a spate of articles and books appeared, considering again the role and functions of the Commission. Analysing the treaty provisions and the work of the Commission in recent times, Bloomfield and Fitzgerald concluded that

> . . . [s]ince many of the problems that could arise under Articles III and IV have been settled, more frequent use has been made, in recent years, of the investigative machinery provided by Article IX. Moreover, as the most obvious problems now requiring settlement are such as would come before the Commission by way of reference, rather than through an application, it would appear that the main role of the Commission in the future will lie in the field of investigation and recommendation.

The authors felt, however, that the Commission still had an important judicial role but, had shown an "apparent reluctance" to grapple with and settle legal issues as it did in the earlier years. They suggested the possible reason for this was the lack of lawyers on the body.

> . . . It is rather disquieting that a body which has an important judicial role in the relationship between two large nations, and which also acts in an investigative capacity in regard to questions involving complex and important legal issues, should, at the very moment when it is seised of some of the most difficult issues ever to come before any international body, number not a single lawyer in its membership. This is a far cry from the early years when five of the Commission's six members belonged to the legal profession.

They recognized, however, the possible values in avoiding an overly-judicial approach to the Commission's work, echoing the sentiments of General McNaughton.

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106. Canada, Department of External Affairs, File 5724-40, Memorandum from Robertson to the Minister (confidential), June 23, 1959; Memorandum from Robertson to the Minister, July 7, 1959.

> It is, of course, appreciated that the Commission's reluctance to settle legal issues may also stem from the practical consideration that, if a difficulty can be settled without pronouncing on the law, prudence may dictate that such a pronouncement should not be made. Thus, it could be argued that pragmatic solutions adopted by the Commission have given it more flexibility in solving difficulties than would be found in solutions based on strict, though admissible, legal interpretations of the Boundary Waters Treaty.[107]

Joseph Barber was concerned about the possible impact on the status and role of the Commission of the partisan positions taken by the respective chairmen in the Columbia River reference and Libby Dam application.

> . . . For diplomatic negotiation at a high level was now to accompany the relatively informal, judicial deliberations of the long established Joint Commission. Could this mean a return to bargaining tactics employed before the days of the Joint Commission when, it was recalled, Canada usually came out on the short end of the stick.[108]

Charles Dunlop in an analysis of the Commission as a judicial tribunal found that while in history and in theory the body was considered to be essentially judicial, in practice it was becoming a "diplomatic bargaining agency entering the market place to reach a decision." This he found not surprising in light of the changes in the nature of the matters coming before it and thought that had the Commission attempted to exist as a strict court of law, it would not have survived. Nevertheless, Dunlop believed that it still had a number of judicial tasks and felt that there should be greater legal representation on the Commission.[109]

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107. Bloomfield, L.M. and Fitzgerald, G.F. Boundary Water Problems of Canada and the United States Toronto, Carswell, 1958, pp. 61-62.

108. Barber, Joseph Good Fences Make Good Neighbors: Why the United States Provokes Canadians New York, McClelland & Stewart, 1958, c. 10.

109. Dunlop, Charles Clifford The Origin and Development of the International Joint Commission as a Judicial Tribunal Queen's University, M.A. Thesis (unpublished), August 1959.

Professor Waite, dealing with the practice and procedure of the Commission, described its process of deliberation as more akin to a legislative committee than to a court of law. He found the rules under which the Commission operated very much out of line with the practice, particularly in relation to references and he noted that this was due in large part to the changing emphasis in the work of the Commission.[110]

Recognizing this discrepancy between the rules of procedure and the present practices of the Commission, the legal adviser to the Canadian section in 1963 called to the attention of the chairman the fact that the rules had not been revised since their adoption in 1912, and suggested amendments and additions designed to cover activities under Article IX.

> The Rules envisaged the Commission as essentially a court handing down decisions in response to applications by or on behalf of one or both Federal Governments. Viewed in the light of experience, the rules are not too clear in the division of responsibilities and rights as between the Commission, the Governments and interested parties. Neither do they make specific provision for handling References under Article IX and X. This is a serious lack, in view of the increasing importance of this aspect of the Commission's activities.[111]

This recommendation resulted in the adoption in December 1964, of a completely revised set of rules of procedure which, as well as streamlining the rules relating to applications, provided a number of rules relating specifically to proceedings on a reference, emphasizing the investigative and recommendatory nature of the procedure.[112]

Finally, the pre-eminence of the investigative, recommendatory and indeed, planning roles of the Commission over the judicial or quasi-judicial functions of the body has been

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110. G. Graham Waite, "The International Joint Commission-Its Practice and Its Impact on Land Use", 13 Buffalo Law Review 93-118 (1963)

111. I.J.C., Can. Sect. File E-1-5, Memorandum from MacCallum to Heeney re Review of IJC Rules of Procedure, Sept. 10, 1963.

112. I.J.C. Can. Sect. File E-1-5-2, Rules of Procedure of the International Joint Commission, adopted December 2, 1964.

recognized implicitly in a number of statements and speeches by Commission personnel in recent years. It has been explicitly suggested in an examination in 1964 of the various references which have come before the Commission. In appearances before the House of Commons committees in 1964 and 1966 the Canadian chairman repeatedly emphasized the investigative nature of the Commission's work, noting that the body "acts not as a continuing conference of two national delegations under instruction from their respective governments, but as a single body seeking solutions in the joint interest and in accordance with the principles set out in the treaty" and, observing that

> . . .[i]t pursues its investigations and obtains advice by means of specially constituted boards the members of which are selected by the Commission from the departments and agencies of government, on both sides of the boundary, where the best technical knowledge and competence are to be found.

While agreeing that in its investigations, particularly in relation to pollution of international waters, the Commission must cooperate with national agencies engaged in similar work to avoid duplication, the chairman pointedly observed, lest there be any doubt that the Commission as an investigative body, no less than as a judicial body, was purely international, that the Commission as an international body could not establish any formal relations with national groups.[113]

Speeches and articles by the engineering and legal advisers to the Canadian section and by both American and Canadian commissioners have also stressed the investigative functions of the Commission. In particular, several have

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113. Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 27th Parliament, 1st Session, June 2, 1966. See also: Standing Committee on Mines, Forests and Waters, Minutes of Proceedings and Evidence, 26th Parliament, 2d Session, Oct. 29, 1964; Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 26th Parliament, 2d Session, July 22, 1964.

illuminated the increasing reliance placed upon the work of the control and advisory boards created in increasing numbers to assist the Commission in the important technical aspects of its work.[114]

Finally, a study undertaken in 1964 of the changing role of the International Joint Commission has drawn the tentative conclusion that

> . . .[t]oday the major role of the International Joint Commission is one of planning and advising to assist the Canadian and the United States Governments in reaching accord on the cooperative development of the common water resources of the two nations on a scale which will result in the optimum beneficial use of these resources to each nation. . .[115]

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114. I.J.C., Can. Sect. File E-8-6, Dr. René Dupuis, Speech to the Montreal Port Council, 1964; File E-8-7, M.W. Thompson, Speech to the Engineering Institute of Canada, Banff, May 1964; Speech to the Twelfth Industrial Waste Conference at Bigwin Inn, Ontario, June 14, 1965; File E-8-8, J.L. MacCallum, Speech to the Lambton Branch of the Association of Professional Engineers, Sarnia, Feb. 23, 1965; File E-8-10, Charles Ross, Statement on Boundary Water Pollution Abatement: United States and Canada, Senate Subcommittee on Air and Water Pollution, Buffalo, June 17, 1965.

115. Jordan, Frederick J.E. The Changing Role of the International Joint Commission (Canada-United States) University of Michigan Law School, LL.M. Thesis, (unpublished), May 15, 1964.

V PERSONNEL AND ORGANIZATION OF THE INTERNATIONAL JOINT COMMISSION

The questions of the qualifications of personnel appointed to the International Joint Commission and of the functional organization and proposals for reorganization of the Commission are not only closely related to each other but are in many ways inseparable from the subject matter of the previous chapter dealing with the nature and character of the Commission itself. The division in treatment is essentially arbitrary, dictated mainly by the bulk of documentation. Arbitrary too, in a number of cases, is the decision as to the chapter in which certain documents are placed, the objective being to reduce repetition to a minimum.

Even with this artificial division the documentation remains large in this chapter. However, the two questions of personnel and organization are so much intertwined that separation is virtually impossible; reorganization has seldom been considered except in terms of vacancies on the Commission at the time. The proposal is thus to consider chronologically the appointments as they were being made, fitting into this order the suggestions for "reform" as they have been advanced from time to time.

A. Initial Canadian Personnel

The question of Canadian appointments was first publicly raised in December 1910 by the Opposition in the House of Commons. When asked if the members of the Commission would be skilled engineers, the Minister of Public Works replied that consideration had not been given to appointments as yet but that the government would appoint only men "eminently fitted for the discharge of these duties . . . " In speaking of the importance of Articles IX and X and the treaty generally, the Minister said:

> Honourable members will see that it is a very far reaching provision, and one which, if the Commissioners are qualified for the performance of their duties, will be likely to make for peaceable relations between the two countries in the future.
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> . . . [I]f this Commission is what we hope it will be; if the gentlemen who are appointed are the right men, and if they proceed to discharge their duties animated by a desire not alone to defend the interests of the country which they represent, but to recognize the right of the neighbouring country, it seems to me that this tribunal will be a most important one in making for permanent peace between the adjoining countries.[1]

Mr. Magrath of the Opposition urged the appointment of "scientific men who can stand up and face the representatives of the United States and do business for this country." In the May debate on the bill to implement the provisions of the treaty, he was most critical of the Canadian appointments to the Waterways Commission, suggesting that because of their lack of scientific training, the Canadian members were forced to rely upon United States engineering skill in every matter dealt with by the Commission. He delivered an impassioned plea for the appointment of top-flight talent to the new Commission.

> I consider that our government has a great opportunity to render a signal service to Canada in the selection of the three Canadian representatives. In my opinion, it is not a question of obtaining gentlemen with legal lore, as the questions which will be involved are engineering questions . . . . Then, it appears to me that this is the time for Canada to hunt for a man who stands pre-eminent in that branch of the engineering profession, which this commission will be called upon to deal with, namely, water questions. Let us get that man, regardless of price or where he comes from . . . . Having secured such a man, let our government place a copy of the treaty in his hands with instructions to carry on investigations along the international boundary, so that when the five-year period for which the treaty was made comes to an end, he will be able to point out all the weak places so far as Canada is concerned . . . . Tell him to study Canada's problems of industrial development so as to be able to lay down a policy of water-power development and water

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1. Canada, Parliament, House of Commons Debates, Session 1910-11, vol. 1, pp. 891; 899-901, Dec. 6, 1910.

> transportation that will permit this country to get its products into markets of the world at the lowest possible figure . . . .[2]

Under the legislation introduced, it was merely provided that the commissioners should be appointed by His Majesty on the recommendation of the Governor in Council and should receive for services an amount to be fixed by the Governor in Council, not to exceed seventy-five hundred dollars per annum. In answer to a question concerning the amount of the salaries, Pugsley stated that they should be the same amount for commissioners on both sides and added that, in his opinion, if the commissioners received the full salary they should work full time for the Commission, but the government had not yet decided whether they would be full-time appointments.[3]

Gibbons, informing Pugsley that Laurier had offered to him the chairmanship of the Canadian section, had suggested to the Minister that he not be given a salary which in any way would prevent him from carrying on his law practice. "The Commission will not require, in all likelihood more than two or three days a month at most of my time." As to the other two appointments to the Canadian section he observed:

> The Americans intend to make the Commission an important one by the high standing of their appointees. I think it is absolutely essential that we should adopt a similar policy and I should like very much to be consulted before anything final is decided with regard either to the secretaryship or the other names to be suggested on this commission.[4]

In response to a query from Gibbons as to how he expected to retain his law practice and yet receive seventy-five hundred dollars per year from the government,[5] nominee

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2. Canada, Parliament, House of Commons Debates, Session 1910-11, vol. 1, pp. 912-913, Dec. 6, 1910; vol. 5, pp. 9101-9109; 9122, May 16, 1911.

3. 1-2 George V, c.28, ss. 6 & 7; Canada, Parliament, House of Commons Debates, session 1910-11, vol. 5, pp. 9218-9219 May 16, 1911.

4. Gibbons Papers, vol. 8, Letterbook No. 1, pp. 950-951, Letter from Gibbons to Pugsley (confidential), Feb. 14, 1911

5. Gibbons Papers, vol. 9, Letterbook No. 2, p. 43, Letter from Gibbons to Geoffrion (confidential), Aug. 30, 1911.

Aimé Geoffrion replied that he had accepted the appointment only on the basis that it would be part-time and would not interfere with his practice which he intended to continue regardless.[6]

When the Borden administration recommended the cancellation of the Liberal nominations and substituted therefor the names of three Conservative party supporters, Casgrain, Powell and Magrath, the last-named nominee being a survey engineer, Gibbons wrote to Geoffrion:

> . . . The objection to having an engineer on the Commission is manifest. It is a Court. An engineer on the Commission will want to give his own opinion, not take evidence from experts. There is no more reason for putting an engineer on the Court than putting one on the Supreme Court at Ottawa, but, Mr. McGrath (sic) wants a job.[7]

Laurier observed of the new nominees that "Casgrain and Magrath will be good men, but Powell will be an extreme partisan."[8] Tawney regretted the loss of Gibbons.

> . . . With your intimate knowledge of the Treaty, its purposes, and also your familiarity with many of the subjects now in controversy between the two countries, your services would have been invaluable to the Commission as well as to Canada and to the United States.[9]

The official reason given by the Borden Government for cancelling the original nominations was that

> . . . the new Government desire the appointment of Commissioners who will be in sympathy with their policy respecting matters which will come before the Commissioners for consideration and determination.[10]

The action and the explanation were severely criticized by the Liberal Opposition in the House. Laurier stated that the action

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6. Gibbons Papers, vol. 7, fol. 2, Letter from Geoffrion to Gibbons, Aug. 31, 1911.
7. Gibbons Papers, vol. 9, Letterbook No. 2, pp. 81-82, Letter from Gibbons to Geoffrion (private), Nov. 17, 1911.
8. Gibbons Papers, vol. 3, fol. 5, Letter from Laurier to Gibbons, Nov. 30, 1911.
9. Gibbons Papers, vol. 3, fol. 5, Letter from Tawney to Gibbons, Dec. 4, 1911.
10. Governor General's Papers, No. 268, vol. 6(b), Despatch from the Duke of Connaught to Harcourt, Oct. 25, 1911; Confidential Prints, International Boundary Waters, vol. 1, p. 197.

of the government "gives a partisan character to the Commission which it should not have." The Minister of Trade observed that the Liberal nominations had reflected exactly the same thing and suggested that this was not unreasonable. He did not think that it was desirable for a Conservative government to have Liberal commissioners in "this very important and confidential office."

> . . . It would seem to me to be inconsistent and absurd that a government coming into power as this did, should be required to have as its confidential commission, engaged in that important business, dealing with this government and to a certain extent with other governments, men who are not in thorough sympathy and accord with the government by whom to some extent they would be directed, and with whom they would have to consult in a confidential way.[11]

Dr. Pugsley, the former Minister of Public Works, attacked what he called the "dismissal" of the Liberal "appointees" and condemned the expression of partisan desirability by George Foster, suggesting that this view meant that with every change in government there would have to be new and sympathetic commissioners appointed.

> . . . These gentlemen were appointed to what is to be, to all intents and purposes, a court. The commissioners are not to act either for the United States or for Canada, but are to consider as a judicial tribunal all questions of an international character . . . . They are to be something like the Hague Tribunal but in a smaller way. They are, as I say, to all intents and purposes a judicial body.

When the Minister of Public Works, Mr. Monk, suggested that the commissioners possessed a representative character as well, Pugsley retorted:

> I do not think they have a representative character; I think they have a judicial character. Why, the treaty contemplates, and so provides, that there might be a division of opinion between the commissioners appointed on either side . . . . It was expected, as I say, not that they would voice the opinions of the government they represented, but that they would act in a judicial capacity, forming a tribunal of a most important character

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11. Canada, Parliament, House of Commons Debates, Session 1911-12, vol.1, pp. 896-899, Dec. 6, 1911.

> to determine the questions of an international nature arising from time to time.[12]

The Liberal Opposition demanded and obtained the tabling of all correspondence relating to the appointment of the commissioners. With this before the House, Pugsley continued his attack, noting from the tenor of the correspondence that the Borden Government felt that the Liberal commissioners would not be in sympathy with the water policies of the new government. He criticized the appointment of Powell of New Brunswick on grounds that as former counsel for the United States in the St. John River dispute, he could not be an impartial commissioner. As for the other two nominees, their only qualifications, he observed, seemed to be that both were defeated Conservative candidates.

When the Prime Minister rose to defend the appointments on grounds that the commissioners must be in sympathy with the government's policies, Laurier dissented.

> I take direct issue with that view of the case. The commissioners appointed have nothing to do with the policy of this government; the duties they have to discharge are quasi-judicial if not absolutely judicial. The tribunal has been appointed to prevent the diversion of the waters of the St. Lawrence, the St. John and other international rivers and to protect the rights of Canadians. Water has become so valuable that it is to the interest of one side or the other to divert its course, and the object of appointing the commission is to prevent this being done. That duty is most important and must command the best judgment of the people of Canada.

He concluded that by its action, the Borden Government had conveyed to the United States the view that the positions of the commissioners were to be purely partisan.

The Minister of Public Works again asked what was wrong with that view.

> . . . It [the Commission] has a judicial character, undoubtedly. It would be absurd to pretend that these three commissioners, who are not exclusively and absolutely judges, should not be in perfect harmony with the government, because they must be in frequent, almost daily, communication with the government whom

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12. Canada, Parliament, House of Commons Debates, Session 1911-12, vol. 1, pp. 966-969, Dec. 7, 1911.

> they represent. That is my contention. They will require information at every moment from the officers of the government, they require assistance from the government, they require to get information and advice from the ministers of the different departments. It therefore seems altogether reasonable that they should be men who have always had the confidence of, and been in political intimacy with, the government whom they are serving. That does not at all mean that the relations between the government and this body of men should be of a political nature in the wrong sense of the word. It means that, for the efficient discharge of their functions, they require to be men who have the confidence of the government in power, always provided of course, that they have all the high qualifications which are needed in that position.
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> . . .
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> As to the nature of the mission confided to these gentlemen, it is in a high degree a judicial mission, but it is not exclusively judicial. They have a representative character, they must keep in constant communication with the government that has constituted them, and it seems to me a proper principle to lay down that they should be men possessing the intimate confidence of the government.[13]

At least one of the Canadian commissioners disagreed with the views of Mr. Monk. Magrath in a letter to Streeter of the United States section expressed his surprise at the suggestion that the commissioners must be in political harmony with the government. He felt that the present commissioners, with the exceptions of Tawney and Casgrain, had divorced themselves from politics on their appointments and he asserted that this must be the case if the Commission were to enjoy the respect and the confidence of the public.[14]

B. Initial United States Personnel

In the United States the qualifications of the commissioners and their relationship to the government were also

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13. Canada, Parliament, House of Commons Debates, Session 1911-12, vol. 1, pp. 981-984, Jan. 10, 1912; vol. 3, pp. 6680-6707, Mar. 30, 1912.

14. Magrath Papers, vol. 6, file 20, Letter from Magrath to Streeter, (private), Sept. 23, 1912.

considered at an early date although not under the same circumstances or to the same length as in Canada. In the draft bill to give effect to the treaty, it was provided that the commissioners, to be appointed by the President by and with the advice and consent of the Senate, should "perform such other duties as they may be called upon to perform under the direction of the Secretary of State." The salaries, to be fixed by the Secretary of State, were not to exceed those paid to the Canadian commissioners and, in no case, were to exceed seventy-five hundred dollars per annum. Anderson, submitting the draft to the Secretary, explained that by these provisions, the Secretary would be able to keep the salaries in line with those of the Canadian commissioners or to provide the United States commissioners with an additional amount "to cover the work to be performed by them for the Department of State apart from their joint duties with the Canadian Commissioners."[15]

Senator Cullom shortly reported objections by the Foreign Relations Committee to the provisions of the Anderson draft bill. He asked what the State Department had in mind in providing for the performance by the commissioners of other duties, doubting the desirability of such a requirement. He also noted that at least one member had reservations about the establishment of any body which was to be a "permanent adjunct of the state department."[16] Knox replied that the United States, by the treaty, was obliged to provide for a <u>permanent</u> body and, as for giving the Secretary authority to impose "other duties",

> . . . we are obliged permanently to maintain those three highly efficient Commissioners to perform the variety of duties indicated in the treaty. Other matters calling for similar qualifications and germane or similar to the regular duties of our Commissioners may possibly, from time to time, arise, and it would seem economical and wise to give the Secretary of State authority, on occasion, to utilize the Commissioners

15. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/112, Memorandum from Anderson to Knox, May 14, 1910; Anderson Papers, box 69.

16. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/114, Letter from Sen. Cullom, Chairman, Foreign Relations Committee to Knox, May 25, 1910.

> so far as their regular duties might permit for any such work. . .[17]

After amending "other duties" to read "duties of a like or similar nature", the Senate approved the bill and transmitted it to the House of Representatives. In the House, the bill ran into more serious objections. Not only was the provision for additional duties found objectionable, even as amended, but also, representatives were opposed to Senate confirmation of the commissioners, to the annual salary for commissioners and, indeed, to providing for a permanent commission in any case.[18] Knox sought to counter the objections. He pointed out the numerous matters awaiting the attention of the Commission and, noting that the Commission under the treaty must last at least six years, suggested that there was enough present work to keep it going for probably ten or more years. As to the House proposal that the commissioners be placed on a per diem allowance, he replied that

> [i]n view of the high international character of the Commission, the character of the work to be performed covering the most important relations between the United States and Canada requiring practically continuous service ...

the Department felt that a per diem allowance would be highly inappropriate.[19]

Due to the numerous objections, the bill was never enacted by the House. The only legislation was the appropriations law providing seventy-five thousand dollars "to be expended under the direction of the Secretary of State." Thus appointments to the United States section and the salaries of the commissioners were left entirely to the Executive and, no duties other than those

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17. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/114, Letter from Knox to Cullom, May 28, 1910.

18. Congressional Record, 61st Congress, 3d Session, 1910-11, vol. 46, part 1, pp. 491-492.

19. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/115, Memorandum from Knox to J.S. Fassett, House of Representatives, June 13, 1910.

under the treaty were imposed on the United States section.[20]

When the President named the first commissioners, two were recently defeated members of Congress and all were active Republicans.[21] This was in accord with his statement to Governor Osborn of Michigan that he had no intention of appointing a Democrat to the Commission.[22] Noting the political complexion of the United States section, Bryce also observed that all three members were from border states. This, he felt, might mean that they would be knowledgeable of boundary matters, but, created a danger of "influences unfavourable to the exercise of a dispassionate judgment."

> If appointments on this Commission are to be looked upon as party patronage and to be given as consolation prizes to politicians who have suffered defeat in their constitutencies probably no better choices could have been made than Messrs. Carter and Tawney. Both are men of good character with considerable experience of affairs. But it may be questioned whether an exclusive experience either as politicians or as lawyers will enable members of this Commission to approach its important duties with that judicial detachment and conciliatory disposition on which the services of the institution will depend. A Commission including a judge and an engineer would probably have promised better.[23]

With the death of Chairman Carter six months after his appointment, Taft indicated that he would name only a

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20. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/118, Memorandum from State Department Solicitor to White House, July 14, 1910; 711.42155/132, Letter from Knox to Taft, Jan. 4, 1911; 711.42155/137, Letter from Knox to Sen. W.E. Purcell, Jan. 23, 1911; 711.42155/141, Letter from Taft to Knox, Mar. 9, 1911; Sundry Civil Appropriation Act, June 25, 1910, Public Law 266, 36 Stat. 384. See also Sundry Civil Appropriation Act, Mar. 4, 1911, Public Law 525, 36 Stat. 285, empowering President to fix salaries of commissioners.

21. W.H. Taft Papers, Presidential Series No. 2, file 1041, White House Memorandum for the President, Mar. 9, 1911.

22. W.H. Taft Papers, Presidential Series No. 2, file 1041, Letter from Taft to Osborn, Mar. 8, 1911.

23. Governor General's Papers, No. 268, vol. 6(a), Despatch from Bryce to Lord Grey, Mar. 14, 1911.

strong and able lawyer to the post and, after two conversations with his Secretary of State, was persuaded to appoint a Democrat, former Senator George Turner of Washington State, providing the Canadians would not resent the appointment in view of the Senator's earlier connection with the Alaska boundary settlement.[24] Commissioner Streeter thanked the President for appointing such an able man as Turner.[25]

Criticism of the appointments was soon voiced in Congress--along with criticisms of the Commission generally. Members of the House Foreign Affairs Committee thought that the Commission did little to justify the "extravagant offices" and handsome salaries (fixed at $7500 per annum) and indeed, was little more than a haven for defeated Senators and Representatives. Representative Townsend, later to become a commissioner himself, summed up the views of the critics thus: "It was a lame-duck proposition, and the lame-ducks had not been trained to show a good exercise for their living." When Senator Borah suggested that Congress cease providing paid vacations for defeated congressmen, Senator Curtis thought that this was perhaps unnecessary for the Commission would finish its work shortly and cease to exist. Senator Root offered a strong defence.

> . . . I do not anticipate that the time will ever come when this Commission will not be needed. I think that as the two countries along this tremendous boundary line become more and more thickly settled the need for it will increase. I do not think we shall ever see the time when this Commission will not be needed to dispose of controversies along the boundary line in their inception, furnishing a machinery ready at hand for the people to get relief and redress without going into

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24. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/165a, Letter from Knox to Turner, Nov. 14, 1911; W.H. Taft Papers, Presidential Series No. 2, file 1041, Note from Knox to Taft, Nov. 22, 1911; Presidential Memorandum to Knox, Nov. 14, 1911.

25. W.H. Taft Papers, Presidential Series No. 2, file 1041, Letter from Streeter to Taft, Dec. 5, 1911.

> long processes of diplomatic correspondence. I think it will have to continue as long as the ordinary courts of the countries continue.[26]

C. The Commission 1912-1920

While the Commission during its first eight years saw some of its most active times as seventeen matters were brought before it and thirteen of them effectively disposed of, there was growing dissatisfaction both with the work of the Commission and with the personnel. This unrest was evident within and without the Commission and led in 1919 to the first serious consideration for change in the basic nature of the body. It also led to the first call for abrogation of the treaty.

With the election in 1912 of a Democratic President, the first change in the membership of the United States section on the basis of political partisanship was made. On the advice of several Democratic senators and his Secretary of the Treasury, Wilson agreed to appoint Obadiah Gardner, defeated Senator from Maine, to the Commission and, on the advice of Secretary Bryan, to obtain the resignation of Streeter to make room for Gardner.[27] Streeter complied, submitting his resignation effective October 1, 1913 when he completed his study of pollution on the Niagara River.[28] Gardner was chosen in December to replace Tawney as chairman. Bryan had also suggested to the President that he remove Tawney although he noted later that with Streeter's removal and Gardner's appointment, they now had a section with two Democrats and one Republican, a balance in accord with that maintained by Republican President Taft.[29]

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26. Congressional Record, 62d Congress, 3d Session, vol. 49, part 4, pp. 3117-3131, Feb. 13, 1913; vol. 49, part 5, pp. 4171-4177, Feb. 27, 1913.

27. Wilson Papers, File IV, case 155, Memorandum for the President, July 14, 1913; Letter from Gardner to Secretary of the Treasury McAdoo, July 29, 1913.

28. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/230, Letter from Streeter to Bryan Sept 2,1913.

29. Wilson Papers, file IV, case 155, Letter from Bryan to Wilson, Sept. 4, 1913; Letter from Bryan to Wilson, Sept. 25, 1913; Letter from Bryan to Wilson, Sept. 27, 1913.

In connection with the proposal of Bryan to remove Tawney as well, Gardner saw the inherent dangers to the United States section, and cautioned the President of the need for stability in the Commission.

> Will say since I have had the honor of being a member of this Commission I have been seriously impressed with the magnitude and importance of its work and in order that the usefulness of the American Section of the Commission may not be in any way lessened or impaired I must respectfully call your attention to the fact that since the creation of the Commission through the joint action by treaty between the United States and Great Britain the personnel of the Canadian section has not been changed but all of the original members from that side of the line are still members. On the other hand the only one of the original members of the United States section that remains is Mr. Tawney. I have no desire to dictate or interfere except to call your attention most respectfully to this fact; that the work of the Commission up to this time has been largely in the initiatory stage in some of the large and important work it has before it to do without referring to any part of the work in detail.
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> I will say I would regard it to be a serious set-back to the work before the Commission to have Mr. Tawney replaced by another at this time. He is I find a very able man and is intensely interested in his work and by reason of his longer service is thoroughly conversant with all the details which a new member no matter how able would not be. He is the only Republican member and maintains the bi-partisan character of the Commission which was adopted at the first and as it appears to me is of the utmost importance to continue in order that the Commission be kept free from becoming a partisan political board which would result in great damage to its usefulness in the great work it is employed in carrying out . . .
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> . . .
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> I understand Judge Turner is to be replaced in March by another who as I have been informed says it will not take much of his time from his other business which if true clearly shows he has no appreciation of the character and importance of the work the Commission is engaged in working out . . . . I am sure you are concerned about maintaining the highest standard in the personnel of the United States section . . .[30]

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30. Wilson Papers, file IV, case 155, Letter from Gardner to Wilson, Jan. 30, 1914.

Although the President gave his assurance that Gardner's advice would guide his actions,[31] he promptly secured the resignation of Turner and on March 1 appointed R.B. Glenn, former Democratic Governor of North Carolina, to fill the position.[32] The Canadian chairman expressed to Turner his regret at the loss of a second United States member. "I believe the Commission will gradually work into performing most valuable service to both countries. At least it is possible to do so with men of your standing."[33] The President soon learned the wisdom of Gardner's caution concerning the new appointment. In a letter to the Secretary of State he remarked:

> I have learned to my surprise that ex-Governor Glenn is actively continuing his lecture engagements since accepting the place on the Canadian Boundary Commission (sic).
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> You may have noticed that the Appropriations Committee of the House has become rather critical of this commission and has begun to doubt whether it is doing work that justifies the expenditure. It undoubtedly is doing work and the work assigned to it is of capital importance, but the criticisms will naturally be strengthened if it appears that the Commissioners do not have to devote much attention to their duties. I wonder if you could get hold of Bob in some way and see what his plans are. I am afraid he is making a great mistake.[34]

Congress was indeed becoming increasingly critical of the Commission. In two appearances before the House Foreign Affairs Committee in 1914, Tawney and Gardner were repeatedly called upon to justify the existence of the Commission and its requests for funds. Asked how much time he devoted to the Commission's work, Gardner estimated about half of his time; agreed that all three should be devoting full time to it. Tawney, however, thought that most of the members did work nearly full time and that the work they did was not of a nature that could

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31. Wilson Papers, file IV, case 155, Letter from Wilson to Gardner, Feb. 3, 1914.

32. Wilson Papers, file IV, case 155, Letter from Glenn to Wilson, Mar. 5, 1914.

33. Magrath Papers, vol. 5, file 19, Letter from Magrath to Turner, Feb. 21, 1914.

34. Wilson Papers, file IV, case 155, Letter from Wilson to Bryan, Mar. 24, 1914.

be handled just as effectively by the State Department. In reply to a suggestion by one member of the Committee (speaking, it seemed, the suspicions of most) "that this commission and its clerical help are mere sinecures", Tawney retorted: "It is a mistake, a positive mistake, and I want to tell you that we are dealing with very important problems, and there are many of them."[35]

Despite the dissatisfaction with the Commission, the President still contemplated the removal of its most effective member. Glenn joined Gardner in protest.

> From a source that I deem absolutely reliable I heard there was an effort being made to get you to remove Hon. James A. Tawney of Minnesota from the Commission, and to substitute in his stead a democrat. While the act putting in force the treaty, and the treaty itself, does not forbid all of the members from being of the same political faith, in my judgment it would be against public policy not to have the minority represented on this Commission. President Taft recognized this by appointing two republicans and one democrat, and now under the democrats, it seems to be decidedly best for us to retain one republican.
>
> In no sense should this Commission be partisan, but on the contrary should be International and non-partisan to the greatest extent.

He concluded that Tawney was by far the most knowledgeable and dedicated of the commissioners.[36] Certain government officials also supported Tawney as a most effective commissioner.[37] Wilson was impressed by these representations and was giving "very serious thought" to the matter.[38] Indeed, when pressure was brought to bear to have representation from the Northwest on the United States section,[39] Wilson confessed his dilemma.

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35. United States Congress, House Committee on Foreign Relations, Hearings on the Diplomatic and Consular Appropriation Bill, 63d Congress, 3d Session, Jan. 30 & Feb. 4, 1914, Dec. 17-25,1914.

36. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/255, Letter from Glenn to Bryan, Nov. 16,1916.

37. Wilson Papers, file IV, case 155, Letter from W.N. Daniels, I.C.C., to Wilson, Apr. 13, 1917.

38. Wilson Papers, file IV, case 155, Letter from Wilson to Daniels, Apr. 16, 1917.

39. Wilson Papers, file IV, case 155, Letter from Sen. J.F. Shaforth to Wilson, June 15, 1917.

> That is a commission whose duties and whose performance of its duties I have been studying a good deal recently, and I find the possibilities decidedly uncertain there . . .
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> . . .
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> The trouble is that there is no vacancy on the Boundary Commission (sic), and I cannot create one without doing one or other of two things, namely, either securing the resignation of the Republican member, who is really doing the best work of all our commissioners, or else bring very great mortification to one or other of the Democratic members, who I must say are not proving of any particular value so far as I can make out. It is a very embarrassing quandary to me and so I have not permitted myself to consider the matter further since Senator Kern's death.[40]

About this time, attention shifted from Tawney to Glenn who had become incapacitated through serious illness. Gardner and Tawney strongly urged the Secretary of State to have the President request Glenn's resignation since they felt it was harmful to the Commission to be operating without the full contingent, the first time this had occurred.

> You will readily appreciate the fact that for the Commission to proceed irregularly under the Treaty or with only part of its members present to hear and determine important cases involving international questions of serious moment and weight will inevitably affect public confidence in the efficiency of our organization as an instrumentality for the settlement of international disputes.[41]

Gardner urged the reappointment of George Turner, a suggestion in which Secretary Lansing concurred.[42] However, he noted that it would be most indelicate to recommend the removal of Glenn when he was so close to death.[43] Glenn remained in office until

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40. Wilson Papers, file IV, case 155, Letter from Wilson to Shaforth June 25, 1917; Letter from Wilson to Shaforth, Aug. 29, 1917.

41. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/335C, Letter from Secretary of State Lansing to Gardner, Sept. 20, 1918; 711.42155/338A, Letter from Lansing to Wilson, Sept. 20, 1918.

42. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/337, Letter from Gardner to Lansing (confidential), Sept. 24, 1918; Letter from Lansing to Gardner (confidential), Sept. 26, 1918.

43. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/346, Letter from Gardner to Lansing (confidential), Oct. 9, 1918; Letter from Lansing to Gardner (personal and confidential), Oct. 17, 1918.

his death, May 16, 1920. In the meantime Tawney had died in June, 1919 and his position was filled almost immediately by former Senator Clarence Clark of Wyoming.

In Canada during this period there were fewer changes in personnel and less political overtones relating to the Commission, a consequence in part, no doubt, of the fact that there were no changes in government. To keep the Commission out of domestic policy considerations, the Cabinet early in 1914 laid down the procedure for bringing private applications before the Commission. Each such application was to be first submitted to the appropriate government department for a determination if the proposal should be forwarded to the Commission. This decision would be taken by the Cabinet.

> . . . [I]t [is] objectionable on principle that a scheme, to which exception might be taken on grounds of domestic policy, should be allowed to go to a Tribunal whose jurisdiction only arises when international considerations come into play, before it has been fully considered from the domestic standpoint.[44]

In October, 1914 the Canadian chairman resigned from the Commission to enter the Cabinet of Borden. Casgrain was replaced almost immediately by a Conservative lawyer from Montreal, P.B. Mignault. There appear no records of any comment on this appointment and the only recorded dissension within the Canadian section centered about the role of the commissioners, when Magrath, the new chairman, complained of the lack of cooperation from his fellow members and their insistence on considering the Commission's functions as purely judicial.[45]

However, in 1918 when Mignault resigned to be elevated to the bench of the Supreme Court of Canada the question of regional and racial representation on the Canadian section was

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44. Decimal File 1910-29, Department of State, National Archives, box 6601, 711.42155/246, Copy of Privy Council Minute 305, Feb. 9, 1914.

45. Magrath Papers, vol. 6, file 20,Letter from Magrath to Mignault (confidential), Oct. 24, 1916.

raised. The Premier of Ontario and the federal Minister of Justice urged Borden to make an appointment from that province since it was vitally concerned with boundary water problems.[46] On the other hand, argued the Minister of Justice, Quebec must retain its representation on the Commission under all circumstances.[47]

Magrath in knowledge of the situation in the United States section and in view of the problems he felt to exist in his own section, took the opportunity to urge upon Borden the need for reconsidering qualifications of the personnel on the Commission. He first suggested retention of Mignault on the Commission while he was at the same time serving on the bench and then added that Borden would do well to take up with the Secretary of State the possibility of each side appointing at least one member from the highest court "to bolster the image of the Commission."[48] He then called upon an official of the State Department to urge upon the Secretary the need to give some serious consideration to the future of the Commission. A memorandum prepared for Lansing to take with him to the Paris Peace conference made the following points:

> . . . He [Magrath] said he regretted to have to inform me that the Commission had lost caste in Canada and in the United States to such a degree that it seemed to have no standing; the members had little interest in the work . . . and that for one he had decided that unless the Commission could be rejuvenated and given a dignified position as an international tribunal he would resign.

It pointed out that the major problem at the moment was the fact that both the United States and Canadian commissioners carried on duties, private or otherwise, outside of their work with the Commission. It indicated that the Canadian Prime Minister was

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46. Borden Papers, vol. 97, O.C. 489, Telegram from Hearst to Borden, Oct. 25, 1918; Letter from White to Borden, Oct. 28, 1918.

47. Borden Papers, vol. 97, O.C. 489, Letter from Doherty to Borden, Oct. 29, 1918.

48. Magrath Papers, vol. 6, file 20, Letter from Magrath to Borden (personal), Nov. 7, 1918.

sympathetic to the idea of appointing a Supreme Court judge to the Commission and thought that the United States might do the same. It observed that Magrath had suggested that Lansing might talk the matter over with Borden while both were in Paris and the writer seconded this proposal.

> . . . The Commission has done good work; it has powers under the treaty which will enable it to consider many difficult questions which are likely to arise between the United States and Canada in the future; it is in short, an institution which may bring the two countries very close together. I do not think the Commission is doing the great work which the negotiators of the treaty thought that it would accomplish, chiefly, I believe, because the members are not required to give their whole time to its work.[49]

To Borden in London, Magrath wrote that he must meet Wilson in Paris to discuss "future policy on appointments to the Commission designed to enhance its stature."

> . . . The position demands broad-minded men of outstanding integrity, with a fair measure of diplomacy; men with capacity to understand engineering problems, and men versed in law.[50]

The Prime Minister met in Paris with Wilson and Lansing and in a memorandum to the Acting Prime Minister indicated that as a result a reorganization would likely occur.

> 1. They entirely agree as to the great importance of the Commission to both Countries for peaceful and expeditious determination of international questions.
>
> 2. They also concur in the advisability of selecting personnel of the Commission from Judges or from persons presenting judicial status.
>
> 3. They consider it impractical to select Federal Judges as in all Federal Courts work is greatly in arrears. Moreover, the constitution forbids any additional remuneration to Federal Judges.
>
> 4. They believe that retired State Judges of education could be secured, whose status would assure judicial

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49. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/340½, Memorandum for Mr. Lansing to take with him to Europe, Nov. 21, 1918.

50. Magrath Papers, vol. 6, file 20, Letter from Magrath to Borden, Nov. 30, 1918.

> determination of all questions submitted to the Commission.
>
> 5. President is to confer with Lansing and has promised he will take up the questions immediately after his return to the United States . . .
>
> Meantime there are two possible alternatives for Canada either to make an immediate appointment and defer reconstruction of Commission until after President's return or to reconstitute immediately, selecting one Supreme Court Judge preferably Duff, one Ontario Judge and one Quebec Judge. I favour latter course but I think we should follow example of United States by appointing Counsel of high standing who should reside in Ottawa and devote himself unreservedly to protection of Canadian interests in all matters coming before the Commission.[51]

White reported that Council felt that an appointment should be made immediately and suggested that the practice of judicial appointments might be adopted later.[52] In this Borden concurred but insisted that the Commission must be given a judicial character and hence a judge should be appointed and, noting that since representation from Quebec must be considered, suggested that a temporary appointment might be made from that province.[53]

Action on appointments was also being urged in the United States. Acting Secretary Polk cabled Lansing in Paris informing him that Glenn had not attended the Commission meetings and that Tawney reported the Commission unable to function and under heavy criticism in both countries because of this, causing a loss of prestige due to the fact that the United States Government showed so little interest in the Commission.

> As the International Joint Commission is really an experiment in a standing tribunal for the settlement

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51. Borden Papers, vol. 97, O.C. 489, Memorandum from Borden (in Paris) to White, Jan. 24, 1919.
52. Borden Papers, vol. 97, O.C. 489, Telegram from White to Borden (Paris), Feb. 4, 1919.
53. Borden Papers, vol. 97, O.C. 489, Telegram from Borden (Paris) to White, Feb. 7, 1919.

> of differences between the two neighboring countries, it would seem unfortunate if the experiment should fail merely by reason of lack of confidence on (sic) the people of the two countries in its ability to handle the questions before it satisfactorily and with due regard for the interest of the countries concerned.[54]

Lansing regretted the situation but pointed out that the President was too preoccupied with the peace negotiations to give time and thought to the Commission. In view of the recent discussions with Borden in which he had advanced the case for appointment of judges rather than lawyers, Lansing suggested, there could be no immediate action on appointments. "Such a reorganization of the commission will have to be very carefully considered."[55]

The situation in the United States section became critical with the sudden death of Tawney on June 12,[56] reducing the effective membership of the section to one and, precipitating action by the President which he might not have otherwise taken if he had had the time on his return to Washington to consider fully the matter of reorganization. His office was immediately inundated with letters from congressmen and other political friends urging the appointment of favoured candidates. The majority of the letters recommended the appointment of former Senator Clarence Clark of Wyoming who had been defeated by the Democratic candidate in the past election.[57] However, a few others suggested the appointment be made on the basis of more substantial considerations. The Secretary of the Interior, noting the importance of the projected St. Lawrence waterway and the desirability of it being referred to the Commission for study and recommendations, requested the President to consider appointing

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54. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/352a, Telegram from Polk to Lansing, Mar. 7, 1919.

55. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/357, Telegram from Lansing to Polk, Apr. 19, 1919.

56. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/365, Telegram from Gardner to Polk, June 12, 1919.

57. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/380a, Telegram from Polk to Lansing, June 26, 1919.

someone who would be able to comprehend the magnitude and importance of such a project.[58] Both Senator Sheppard and chairman Gardner, as well as the Engineering Council, urged the appointment of a qualified engineer who could match the talents of the Canadian section and provide the scientific skill necessary on the Commission.[59] Senator Sheppard further suggested that it be someone non-political so that he would not be subject to removal with a change in administrations.[60]

Lansing sought to stave off the pressures by indicating that he wished to discuss with the President the reorganization of the Commission when they returned to Washington; that the proposals made by Borden appealed to him. Consequently, there could be no consideration of appointments until this had been done.[61] However, the President eventually bowed to the insistence of the petitioners and on July 15 indicated that he had selected Clark to fill the vacancy. To his Secretary of the Interior he explained that he felt Clark would be able to deal with the St. Lawrence reference.[62]

In Ottawa, the belief continued that a reorganization would be undertaken. Magrath offered to submit his resignation to Borden so that he would have a free hand in reorganizing.[63] To Lansing, Borden recalled the Paris discussions and the agreement for a need to reconstitute the Commission. He suggested that he was now ready to act, proposing that they might consider

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58. Wilson Papers, file IV, case 155, Letter from Secretary F.K. Lane to Wilson, June 27, 1919.

59. Wilson Papers, file IV, case 155, Letter from Engineering Council to Wilson, July 3, 1919; Letter from Gardner to Wilson, July 12, 1919.

60. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/380, Letter from Senator M. Sheppard to Polk, June 30, 1919.

61. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/367, Telegram from Lansing to Polk, June 18, 1919.

62. Wilson Papers, file IV, case 155, Letter from Wilson to Lane, July 15, 1919.

63. Magrath Papers, vol. 6, file 20, Letter from Magrath to Borden, July 28, 1919.

an informal agreement to each appoint at least two persons of high judicial office and experience.[64] There is no record of a reply to this communication, but in September Borden replied to Magrath, asking him to remain as chairman and promising once more to give attention to reorganizing the Commission.[65]

The "reorganization" which occurred was not what Magrath had anticipated. The first change was a proposal by the government to place the staff of the Canadian section of the Commission within the provisions and jurisdiction of the new Civil Service Act. Burpee objected to this on the ground that the Commission was an international organization.[66] Magrath wrote:

> When the Commission was being organized early in 1912 the six Commissioners after giving the matter of organization a great deal of attention concluded that it would be quite unwise to build up staff in both the Washington and Ottawa offices, fearing that possibly such permanent officials might develop a national viewpoint which would be detrimental to the purposes for which the Commission was created . . . . it was therefore decided that we should keep our respective permanent organizations as small as possible and employ from time to time such assistance as we might require for specific problems.

Thus, due to the small number of personnel involved and, because of the international status of the Commission, it would be most unwise to have the staff appointed by the Civil Service Commission.[67]

The second step in "reform" was a letter from the Acting Prime Minister to Magrath informing that the "Government have been giving serious consideration to the position and work of the Commission" and the Cabinet was thinking, though it had not yet

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64. Borden Papers, vol. 97, O.C. 489, Letter from Borden to Lansing July 29, 1919; Decimal File, 1910-29, Department of State, National Archives, box 6602, 711.42155/284.

65. Magrath Papers, vol. 6, file 20, Letter from Borden to Magrath, Sept. 6, 1919.

66. I.J.C., Can. Sect. File E-16-2, Memorandum from Burpee to Committee on the Bill to amend the Civil Service Act.

67. I.J.C., Can. Sect. File E-16-2, Letter from Magrath to N.W. Rowell (confidential), Jan. 28, 1920.

decided, of requiring all members of the Commission to live in Ottawa and to devote full time to the Commission's work. Meantime he was requesting the chairman to advise members that they were to give priority to the work of the Commission, all other activities to be purely subsidiary.[68]

Finally, and at the same time, Borden filled the vacancy on the Canadian section with the appointment of William Hearst, a lawyer from Toronto and former Conservative premier of Ontario.[69] The only public protest this appointment brought was from certain Quebec Members of Parliament who argued that the Commission should have a French-speaking representative from that province. Borden simply replied that "it is generally desirable to have a member from Quebec on the Commission."[70]

In February 1920 Representative Smith of Illinois introduced a resolution calling for abrogation of the 1909 Treaty for the reason that "sufficient disputes are not now arising between the contracting parties to warrant the continuation of the treaty . . . "[71] Although he assured the State Department that his only purpose was to ascertain if the Commission was doing any work at all,[72] the House when considering the estimates of the Commission slashed the appropriation from $75,000 to $25,000 and provided maximum salaries of thirty-five hundred dollars for each of the Commissioners. Although the original appropriations were ultimately restored by the Senate, Congress made it clear that

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68. Magrath Papers, vol. 6, file 22, Letter from George Foster to Magrath, Feb. 7, 1920; Canada, Department of External Affairs, File 35-20, Letter from N. Rowell to Magrath, Feb. 7, 1920.

69. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/391, Note from the British Ambassador to Lansing, Feb. 6, 1920.

70. Canada, Parliament, House of Commons Debates, 13th Parliament, 4th Session, 1920, vol. 4, p. 3986; 5th Session, 1921, vol. 1, pp. 164; 510.

71. Borden Papers, vol. 17, O.C. 82(2), Despatch from British Embassy to Foreign Office, Feb. 28, 1920; Congressional Record, 66th Congress, 2d Session, vol. 59, part 3, p. 2790, Feb. 11, 1920.

72. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/404, Memorandum re Rep. Smith Resolution 289 to dissolve the IJC, Feb. 1920.

it, at least, was not satisfied with the personnel of the Commission or with their work.[73]

On May 16, 1920 Glenn died while attending a meeting of the Commission in Winnipeg,[74] and once again the lobbying commenced for the appointment of particular candidates. Among the suggestions was one from the Secretary of the Interior again calling for someone competent to deal with the St. Lawrence reference and, one from the Engineering Association recommending the appointment of an engineer.[75] However, most of the pressure was for political patronage appointments.[76]

D. The Commission 1921-1939

During the 1920s and early 1930s little attention was paid to the Commission in the United States save for a number of appointments which were made. It was not until the second term of Roosevelt that action was taken which led to the basic reorganization of the United States section. It was rather the Canadian section which attracted the attention during this period with an attempt by the new Canadian government to mold its section in its own political image as had become the practice in the United States.

Shortly after the election of 1921 brought Mackenzie King's Liberals into office, pressure was brought on the Prime

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73. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/393, Correspondence and Memoranda re Salaries of United States Commissioners, Jan-Mar 1920.

74. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/394, Telegram from Kluttz to State Department, May 17, 1920.

75. Decimal File 1910-29, Department of State, National Archives, box 6602, 711.42155/405, Letter from American Association of Engineers, Denver Chapter, to President, July 30, 1920; 711.42155/398, Telegram from W.H. Bixby to Secretary Colby, May 17, 1920; Wilson Papers, file IV, case 155, Letter from Assistant Secretary of the Department of the Interior to Wilson, June 16,1920.

76. Wilson Papers, file IV, case 155, Letter from ex-Sen. F. Dubois (Idaho) to Secretary to the President, May 18, 1920.

Minister to replace all of the Conservative appointees on the Commission with Liberals and to have at least one member from Quebec. Accordingly King called Magrath in and after discussing the relationship between the Commission and the governments, told the chairman that his government wanted the resignations of the commissioners although he suggested that he would not accept Magrath's.[77]

Magrath promptly submitted his resignation, noting that he did not approve of the practice of removing commissioners with each change of administration.[78] King did not appreciate this position, feeling that Canada's representation on the Commission must be a matter of government policy.[79]

The other commissioners were not so cooperative. Both refused after meeting with the chairman to submit their resignations on grounds that King had neither the right nor the legal power to dismiss them.[80] In letters to the Prime Minister and the chairman, Hearst pointed out the dangers he felt to be inherent in the position taken by King that there must be a confidential political relationship between the Commission and the government. Such a relationship would completely destroy public confidence in the body. And changing the commissioners with each new government would deprive the Commission of its most valuable characteristic: its continuity and permanency of membership.[81]

The press was divided over the situation. Most papers felt that in principle, there should be no wholesale changes with

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77. Magrath Papers, vol. 6, file 20, Memorandum of Meeting, Jan. 27, 1922 between King and Magrath, Feb. 3, 1922.

78. Magrath Papers, vol. 6, file 20, Letter from Magrath to King, Jan. 28, 1922; King Papers, vol. 78, No. 65772.

79. King Papers, vol. 78, No. 65773, Letter from King to Magrath, Jan. 31, 1922.

80. Magrath Papers, vol. 6, file 20, Memorandum of Meeting of Commissioners with Prime Minister, Feb. 8, 1922.

81. Magrath Papers, vol. 6, file 20, Letter from Hearst to Magrath, Feb. 20, 1922; Letter from Hearst to King Feb. 25, 1922.

each new government. On the other hand, many supported the idea of one member being from Quebec and urged the removal of Powell to accomplish this.[82]

Although the Prime Minister was not certain enough of his legal rights to move quickly on the matter, the fear of the Commission becoming little more than a haven for retired politicians on both sides caused a degree of despondency among its supporters. However, it also spurred a renewed campaign to give the body vigour and respect. In a letter from Magrath to Townsend the Canadian chairman suggested that the Commission would never be respected as long as it was considered solely as a place for patronage appointments -- and it would not attract the best men unless there was a degree of permanency in the position.[83] To the Prime Minister he said the same thing, urging that the Commission be given more work.[84] The Monitor also condemned the practice of political appointments.

> The tendency of national leaders, both in Washington and Ottawa, to regard the responsible positions on the International Joint Commission as suitable rewards for unsuccessful candidates in party politics is hardly calculated to lead the public to hold the Commission in that high esteem which should be accorded to such a judicial body. A move should be made to give the International Joint Commission something like the status of the Supreme Court. . . [85]

A speech by Secretary of State C.E. Hughes to the Canadian Bar Association in 1923 advocating the establishment of a body like the International Joint Commission to deal with all matters of difference between the two countries[86] was immediately

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82. Magrath Papers, vol. 6, file 20, Toronto Star, Jan. 31, 1922; Toronto Star, Feb. 3, 1922; Ottawa Citizen, Feb. 8, 1922; Boston Transcript, Feb. 11, 1922.

83. Magrath Papers, vol. 5, file 19, Letter from Magrath to C.E. Townsend (personal), June 14, 1923.

84. King Papers, vol. 90, No. 76363-76367, Letter from Magrath to King, June 9, 1923.

85. I.J.C., Can. Sect. File E-16, Christian Science Monitor, June 23, 1925.

86. Hughes, Charles Evans The Pathway to Peace: Addresses 1921-1925 New York, Harper, 1925, pp. 3-19, "The Pathway to Peace", Address to the Canadian Bar Association, Montreal, Sept. 4,1923.

taken as a slight by the supporters of the Commission and was roundly attacked. Magrath noted pointedly that the Commission was already capable of dealing with all matters which might arise if anyone were interested in using it.[87] He was supported by his press allies.[88] Burpee came forth with his strongest plea for recognition of the value of the Commission.

> . . . It has, or should have, got beyond the experimental period. It has in very truth reached the critical stage, where experiments, whether national or international, must of necessity be either accepted as sound policies or rejected as failures. It rests with the people of these two countries, through their governments, to decide the issue. It rests with them either to drop the Commission, as something that has been tried and found wanting, or to accept it as an international agency whose usefulness has been clearly established. But mere acceptance is not enough. This tribunal, like any other human institution, cannot stand still. It must go forward or backward. If the people and their governments are convinced that the Commission fills a real need in the life of these two nations, they are morally and logically bound to see that it does go forward; to remove all objects that may lie in its way of greater usefulness; to build it up into an instrument of such unquestionable value that it may well serve as an example to the other nations of the civilized world.
>
> . . .
>
> It is perhaps too much to hope that the growth of a widespread sentiment of confidence in and respect for this international tribunal can be anything more than a very gradual process. The idea of such an institution is still apparently a novel one to the people of both the United States and Canada . . . and [they] have not yet grasped the fact that they now possess a really effective means of settling their differences, a means that is as much ahead of the old methods as the automobile is an improvement on the stage-coach.
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> . . .
>
> . . . [T]here is no getting away from the fact that the Treaty of 1909 and the International Joint Commission

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87. Magrath Papers, vol. 5, file 19, Letter and Memorandum re the International Joint Commission from Magrath to King, Sept. 18, 1923; King Papers, vol. 90, No. 76381-76385.

88. I.J.C., Can. Sect. File E-16, Ottawa Citizen, Sept. 29, 1923; Lethbridge Herald, Sept. 15, 1923.

> will not and cannot realize the tremendous possibilities of good that lie within them, until the people of these two neighbouring democracies determine to give them their intelligent and whole-hearted support.[89]

Under pressure once again from his party to remove the Conservative commissioners, King instructed his Under Secretary of State to obtain from London assurances that any changes which he recommended in the Commission personnel would be granted without question by the British Government.[90] Pope obtained this assurance and informed the Prime Minister that all he had to do was to nominate new commissioners.[91] But still King delayed any action in the matter, simply assuring the questioners in the House that the government had the matter under consideration.[92]

In 1925, Magrath accepted an appointment by the government of Ontario as chairman of the Ontario Hydro-Electric Commission and he promptly submitted his resignation to King, noting however, that he believed that he could handle both jobs. Rather than taking this opportunity to appoint a chairman of his own choosing, King asked Magrath to remain on as chairman in addition to his new duties.[93] Magrath agreed to remain for a time but, upon hearing the rumours that both governments were contemplating the abolition of the Commission in light of the establishment of formal diplomatic relations between the two countries, he announced that he was definitely leaving the Commission and requested the Prime Minister to appoint a successor. To Clark of the American section he expressed his dismay at the new proposal.

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89. L.J. Burpee, "An International Experiment", Papers Relating to the Work of the International Joint Commission, 1929, pp. 48-62

90. Canada, Department of External Affairs, File 1514-40, Memorandum from King to Pope, Jan. 26, 1924.

91. Canada, Department of External Affairs, File 1514-40, Memorandum from Pope to King, Jan. 29, 1924; Magrath Papers, vol. 6, file 20, Despatch from Lord Byng to Colonial Secretary, Feb. 19, 1924, Despatch from Colonial Secretary to Lord Byng, Apr. 26, 1924.

92. Canada, Parliament, House of Commons Debates, 14th Parliament, 3d Session, vol. 1, p. 324, Mar. 14, 1924; vol. 2, p. 1955, May 12, 1924.

93. Magrath Papers, vol. 6, file 20, Letter from Magrath to O.D. Skelton, Oct. 6, 1925; King Papers, vol. 119, No. 101550-101551.

> I am sure upon reflection, especially in view of the results of our work as a Commission, you fully realize that no agency could be as useful in settling differences as the International Joint Commission.
>
> . . .
>
> There will always be a political complexion in approaching problems by the accredited representatives of one country when coming in contact with members of the Governments to which he is accredited. Furthermore they will not have the same patience in dealing with the problem as a permanent organization like the Commission.
>
> I am aware that it has taken us some time to deal with some of the issues that were before us, but is it not better that that should be done in order to find a solution more or less satisfactory to both Countries?[94]

Loring Christie, an officer of the Department, expressed his opposition to such a move in a lengthy letter to the Under Secretary.

> For myself I feel without any hesitation or reservation whatever that in the realm of State machinery Canada has no more vital interest than the insurance of the full integrity of the system created by the Treaty of 1909; I do not except any aspect of our external relations; and I think Canadian Governments should never fail to measure the thing in this sense whenever a decision affecting it is required.
>
> . . .
>
> The International Joint Commission is vital to facilitating our relations with the United States. In providing a set of general principles, an independent tribunal and a growing body of practice and habit, to which an important class of specific questions arising from time to time can be delegated with a fair assurance that they will be determined with something of the certainty that municipal courts achieve in their sphere, the system has clearly shown an advance over the precarious method of sporadic intergovernmental negotiations.
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> . . .
>
> Our vital necessity to preserve the system at full strength is not lessened in the least degree by reason of the establishment of our Legation at Washington.

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94. Magrath Papers, vol. 5, file 19, Letter from Magrath to C.D. Clark (personal), Mar. 19, 1927.

> A diplomatist is simply an agent; his establishment no more than a convenient extension abroad of the departmental machine at home; his job more to bargain on the lay of cards at the moment than to administer a set of rules and build an ordered regime . . . . Our own Treaty of 1909 system can handle certain problems which diplomacy is physically incapable of handling . . . . The publicity attending the Legation is inevitable but let us hope that "public opinion" will not be so naive as to imagine that, having thus gone into an old game, it is somehow relieved from worrying about the new 1909 achievement.

Christie pointed out that practically Canada would always bear the burden of preserving the system because it meant more to the small nation than it did to the big. Consequently, Canada should always make appointments of the highest caliber and urge the United States to do likewise. The Commission served too important a need for the governments to do otherwise.

> The institutional basis thus created is the only one on which civil relations of any stability or permanency between the two sovereignties on this continent are conceivable, and nothing can be more important than to preserve this or forestall any assault upon it . . . . To let it down would really mean that instead of having a set of principles, a growing body of reasoned practice with the sanction of habit, we would be relegated wholly to a mere conception of "comity" -- a conception which historically and indeed, given the nature of "sovereignty", inevitably contemplates in its natural order such practices as retaliation and the like.

Christie concluded by observing that the attitudes of the two governments in recent years towards the Commission were certainly not designed to enhance its status and consequently to be decried. Much more use should be made of the body.[95]

Partly perhaps as a consequence of this case made for the Commission by Christie, any idea of abolishing it in favour of diplomatic action was abandoned by the governments. Instead, King again demanded the resignations of Powell and Hearst, threatening removal if they did not comply with his request,[96]

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95. Magrath Papers, vol. 6, file 20, Letter from Loring Christie to O.D. Skelton (private), July 12, 1927.

96. Magrath Papers, vol. 6, file 20, Memorandum for Magrath's Diary, Feb. 24, 1928.

and asked Magrath to resign from Ontario Hydro so that he could return to full-time chairmanship of the Commission to revitalize it.[97]

While Hearst again ignored the threat, Powell relented and submitted his resignation. He was replaced immediately in July 1928 by the appointment of George W. Kyte, a lawyer from Nova Scotia and a former Liberal Member of Parliament. Magrath was reluctant to leave his work with the Hydro Commission but did agree to remain as chairman of the International Joint Commission concurrently with his other duties.[98] Thus the Commission still looked very much like it had when King originally announced his intention to change it.

The advent of the Conservative Government under Bennett in 1930 caused no changes in the personnel of the Canadian section. Neither did it bring about an improved relationship between the government and the Commission. The slash in the commissioners' salaries as a part of the economy move of 1932 was viewed with suspicion by the commissioners, Hearst feeling that they should be treated the same as judges who had not had their salaries reduced. Magrath agreed but indicated that he would accept the cut without protest.[99]

Magrath's pride in the Commission but dismay with the lack of respect for it by the government was summed up in a letter to Percy Corbett of McGill Law School in 1932.

> . . .[I]ts soundness rests on the equal representation by the two countries and upon its permanency. The weakness of the old system lay in the creation of a Commission for each special issue, in which more attention was paid to the umpire's casting vote than in setting out to find a solution that would be reasonably fair to the countries involved, as is necessary under the International Joint Commission, if an agreement is to be reached. The

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97. Magrath Papers, vol. 6, file 20, Letter from Skelton to Magrath (personal and confidential), Mar. 3, 1928.

98. Magrath Papers, vol. 6, file 20, Memorandum re International Joint Commission, prepared by Magrath, Mar. 9, 1928; Letter from Magrath to King (personal), Apr. 14, 1928.

99. I.J.C., Can. Sect. File, Hearst Papers, General File, Jan.-Dec. 1932, Letter from Hearst to Magrath, Feb. 16, 1932; Letter from Magrath to Hearst, Feb. 17, 1932.

> success of the Commission depends on the care that both countries exercise in finding representatives with national reputations for integrity, and also upon a determination on the part of both countries to build up the organization in the mind of the public as a great piece of international machinery, so that once an agreement is reached, that decision will largely receive the support of the people. For maximum results prestige is as necessary as authority.

In his opinion, the Canadian Government had always been careful to avoid political influence on the Commission but, it had carried the policy of non-interference too far, leaving the Commission with "no place in the machinery of State."[100] In other words, the Canadian Government ignored the Commission completely.

Magrath maintained this attitude through the balance of the Bennett administration and when, on his re-election in 1935 King suggested that Hearst should resign to make way for the appointment of Charles Stewart, former Liberal premier of Alberta and more recently, defeated minister in the King Cabinet, Magrath was irate and submitted his own resignation to King. It was accepted this time and, on January 20, 1936 Charles Stewart became a commissioner and was made chairman, replacing Magrath.[101]

Stewart had not long been chairman when he began to have the same feeling of isolation of which Magrath complained. To the Prime Minister he suggested several matters which he felt should be referred immediately to the Commission, among them the salmon fisheries problem on the west coast.[102] From the Prime Minister he received the same assurances that had been given to Magrath.

> I think there is a great deal to be said for utilizing the International Joint Commission for inquiries into questions of joint interest to the United States and Canada, other than those boundary water questions which are their primary concern. The wider the work of the

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100. Magrath Papers, vol. 5, file 18A, letter from Magrath to P.E. Corbett (private), Dec. 19, 1932.

101. Magrath Papers, vol. 6, file 20, Letter from Magrath to Dr. W.H. Smith, Nov. 15, 1935; Memorandum re Retirement from the IJC, Dec. 30, 1935.

102. King Papers, unnumbered, Charles Stewart to King, Aug. 25, 1937.

> Commission, within the general field of joint factual issues, the more likely is its prestige to be increased and its authority strengthened.

To this Skelton added:

> I think there is a good deal to be said on general principles for giving the Commission more work and to appoint Commissioners who would be prepared to do more work . . .[103]

Stewart did not stop there however. He proceeded to talk with Chairman Stanley of the United States section and then called upon the President urging greater and better things for the Commission. He also discussed certain possible references with the provincial officials.[104] From the Canadian Government the reaction was annoyance.

> The International Joint Commission is fundamentally a judicial tribunal acting as an arbitral body, and as a mediator between the governmental agencies in Canada and the United States. Its usefulness depends upon its preserving its position as a dignified international organization. I should be the last to want to see it develop into a legalistic court. On the other hand, there is a middle ground between the legalistic conception of a court and an administrative agency.
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> . . .
>
> . . . It has never been considered to be the business of the International Joint Commission to participate in any way in the negotiations ending with a reference to the tribunal for the purposes of deciding the issue in question between the two Governments.

The memorandum concluded that the chairmen were overstepping their authority and propriety in soliciting business for the Commission. It was embarrassing to the senior governments.[105]

From the United States Government, the reaction was a proposal and subsequently, a decision to reorganize the United States section of the Commission to provide for more effective and efficient functioning of the body. Canada did not feel

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103. King Papers, unnumbered, King to Stewart, Sept. 2, 1937.

104. King Papers, unnumbered, Letter from Stewart to King, Sept. 8, 1937.

105. Canada, Department of External Affairs, File 2492-D-40, Memorandum from John E. Read, Legal Adviser to Under Secretary, Dec. 29, 1939.

that the change was in the best interests of the Commission. But to consider first the changes that had occurred in the United States section up to that point.

When the vacancy in the United States section caused by the death of Glenn was filled in 1921 just before Wilson left office, it was with the appointment of Marcus A. Smith, a lawyer and former Senator from Arizona, having been defeated in the 1920 elections. At the same time, Wilson demanded the resignation of Gardner which was submitted, over protest, on February 28. On March 4 Wilson named his outgoing Secretary of Labor, W.B. Wilson to the position.[106] This appointment was short-lived. Gardner enlisted the aid of his former Senate colleagues, importuned President Harding to reappoint him, and suggested to the Canadian chairman that "if someone in Canada should enter a mild protest against State Department having two new members placed on the Commission at this juncture, it would be very effective in results . . ."[107] Magrath declined the invitation but Gardner succeeded without the intervention.[108] On March 21 Wilson submitted his resignation to Harding and two days later Gardner was reappointed and named chairman.[109]

Two years later Gardner was asked to resign again and Clark was designated chairman. The vacancy caused by Gardner's removal was filled by Charles E. Townsend, a former Republican Senator from Michigan defeated in the 1922 elections. In April 1924 Smith died, leaving another vacancy to be filled. This had no sooner been accomplished in July with the appointment of former Republican Senator from Idaho, Fred T. Dubois, when Townsend died in August. A year later in June 1925 President Coolidge named P.J. McCumber, a former Republican Senator from North Dakota

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106. Wilson Papers, file IV, case 155, Memorandum of President, Mar. 3, 1921.

107. Magrath Papers, vol. 5, file 19, Letter from Gardner to Magrath, Mar. 7, 1921.

108. Magrath Papers, vol. 5, file 19, Letter from Magrath to Gardner, Mar. 16, 1921.

109. I.J.C., Can. Sect. File E-16, see generally for appointments of personnel.

to the vacancy.[110]

During this whole period the Commission was largely ignored in Congress. Appropriations were passed each year and, only in 1927 did one of the members of the House move that the Commissioners be put on a per diem allowance since there was "practically no work for them to do."[111]

President Hoover on assuming office took immediate steps to remove the incumbent chairman, C.D. Clark. Besides believing the chairman's health to be such as to preclude him from engaging in the "important negotiations which are likely to be designated to the International Joint Commission", the President observed that the part of the country east of the Mississippi was unrepresented on the Commission and "[t]hese areas are pressing strongly that they should be represented, especially in view of the problems that are likely to arise."[112] To replace Clark, Hoover named John H. Bartlett, one-time Governor of New Hampshire and later assistant Postmaster General until his appointment to the Commission. Bartlett assumed the chairmanship immediately.[113]

In February 1930 the Democratic member of the Commission, F.T. Dubois died and, in May another Democrat was named by Hoover to replace him. On the recommendation of Secretary of State Stimson, A.C. Stanley, former Senator from Kentucky was appointed[114] and, with the resignation of Bartlett in 1933, he became chairman, a position which he occupied until 1954.

In 1931, an interesting incident occurred. Chairman Bartlett decided to contest a House district in his home state

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110. I.J.C., Can. Sect. File E-16, see generally for appointments of personnel.

111. Congressional Record, 69th Congress, 2d Session, 1926-27, vol. 68, part 3, pp. 2378-2379. See too, 1926-27, vol. 68, part 3; 1927-28, vol. 69, part 1; 1929-30, vol. 73, part 5.

112. I.J.C., Can. Sect. File E-16, Letter from Hoover to Clark Apr. 30, 1929.

113. I.J.C., Can. Sect. File E-16, see generally.

114. Decimal File 1930-39, Department of State, National Archives, 711.42152/233, Letter from Stimson (London) to Acting Secretary Cotton (confidential), Feb. 27, 1930; 711.42152/231, Telegram from Cotton to Stimson, Feb. 28, 1930, Note from Stimson to U.S. Legation, Ottawa, May 21, 1930.

in the 1932 elections. He was defeated and resumed his duties as chairman of the Commission.[115] The situation was roundly criticised by the Canadian chairman.[116]

This incident was followed by the introduction in Congress of the President's economy legislation and the House took this opportunity to question again the value of the Commission. It was proposed that instead of simply reducing the salaries of the commissioners from $10,000 to $5,000 (they had been increased by Presidential order in 1930 from $7,500), the House instruct the President to terminate the Commission. When the chairman of the Appropriations Committee was asked if the Commission really had any work to do he replied:

> . . . There are some questions pending before them of importance. I have felt that so long as the commission continues there is always this danger. Parties who are interested in building power dams will make it a point to bring pressure on the two governments to refer such questions to the commission when, in fact, there is no real public need for the matters to be so referred.
>
> Personally, I think when they shall have completed the inquiries that are now before them there is no pressing reason why the commission should be continued.[117]

The Canadians were hopeful that the President would strengthen rather than abolish the Commission.[118] The United States commissioners were opposed to the fifty percent reduction in salary when all others in the federal service were receiving only an eleven percent reduction. Said the chairman:

> The actual truth is that all three of us are compelled by our duties to live in Washington and are in attendance here every day. The work of the Commission was never so

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115. I.J.C., Can. Sect. File E-16, Christian Science Monitor, Jan. 8, 1932. Note: Although there is no record of his resignation or reappointment, the State Department files suggest this occurred.

116. Magrath Papers, vol. 5, file 18A, Letter from Magrath to P.E. Corbett (private), Dec. 19, 1932.

117. Congressional Record, 72d Congress, 2d Session, 1932-33 vol. 76, part 3, pp. 2619-2620, Feb. 20, 1932.

118. Canada, Department of External Affairs, File 1514-40, Letter from Wrong, Canadian Legation, Washington to Skelton, Mar. 28, 1932; Letter from Skelton to Wrong, Apr. 4, 1932.

> was never so extensive as it is now and is constantly growing. The relation of the two sections is fine and it would seem to us to be unwise to give it a special black eye at this time.[119]

The government and Congress were unsympathetic and the salaries were slashed on July 1, 1932 to $5,000 per annum.[120] The following year they were subjected to a further fifteen percent reduction[121] where they remained until 1937 when they were restored to $7,500 per annum.

With the election of Franklin Roosevelt there was the expectation in some quarters that considerable improvements would be made in the Commission. Such were the hopes of the contributing editor of the Monitor who felt that Hoover had done little to improve the quality of the personnel of the Commission.

> . . . The Commission in the past has done enough to indicate how much it might do if instead of being manned by lame ducks of purely political appointees, it was composed of men of vision and able to comprehend what the commission might be made as an illustration of the possibilities of international cooperation.[122]

Roosevelt's first move was to have Stanley replace Bartlett as chairman of the section.[123] Ignoring pleas from Gardner for reappointment,[124] he requested the State Department to advise him on proposals for change in the Commission.

The memorandum prepared for the Under Secretary described the Commission as basically an international fact-finder

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119. Decimal File 1930-39, Department of State, National Archives, 711.42152/356, Letter from Bartlett to Assistant Secretary Carr, Apr. 30, 1932.

120. Decimal File 1930-39, Department of State, National Archives, 711.42152/362A, Letter from Assistant Secretary Carr to McCumber, July 1, 1932.

121. Decimal File 1930-39, Department of State, National Archives, 711.42152/371, Letter from Carr to Stanley, Apr. 12, 1933.

122. Decimal File 1930-39, Department of State, National Archives, 711.42152/376, Letter from W.J. Abbot to Under Secretary Wm. Phillips, Mar. 20, 1933.

123. Decimal File 1930-39, Department of State, National Archives, 711.42152/370, Letter from Secretary, U.S. Section to Secretary Hull, Mar. 8, 1933.

124. Decimal File 1930-39, Department of State, National Archives, 711.42152/373, Letter from Gardner to Roosevelt, Mar. 27, 1933.

operating under Articles VIII and IX. As for Article X it might be used some day and hence

> . . . it would be helpful to have as our representatives on the Commission men of sufficiently high caliber that the United States could without hesitation make use of this very important provision . . .
>
> The Department has never been fully satisfied with the personnel of the American section of the Commission. To enable the Commission to deal effectively with the scientific and legal questions referred to it, it is believed that the American section should include: a competent engineer familiar with water power and navigation problems, a lawyer with wide experience in international negotiations, and an able lawyer experienced in the conduct of judicial proceedings. The appointment of able men in the vigor of life is highly desirable, with a view to have the Government receive the benefit of their services for a number of years after they have become familiar with the nature of the work. The Chairman of the Canadian section, Mr. Charles A. Magrath, is an engineer and has been a member of the Commission since 1912. The other two Canadian members, Sir William Hearst and Mr. Kyte are able lawyers.[125]

The Under Secretary forwarded this memorandum to the President with the following recommendation.

> The standing of the American Section of the International Joint Commission is, in my opinion, a matter of extreme importance and I very much hope that everything possible can be done to give it the dignity and prestige to which it is entitled under the Root-Bryce Treaty of 1909. Without adequate personnel, the Commission cannot properly perform its functions.[126]

The death of McCumber a month later gave the President his first opportunity to reorganize the United States section. Despite the urgings of the American Engineering Council for the appointment of an engineer,[127] Roosevelt named Eugene Lorton, a newspaper publisher and party supporter from Oklahoma as new commissioner on June 5.

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125. Decimal File 1930-39, Department of State, National Archives, 711.42152/376, Memorandum from J.D. Hickerson, Western European Div. to Phillips, Mar. 31, 1933.

126. Decimal File 1930-39, Department of State, National Archives, 711.42152/376, Note from Phillips to Roosevelt, Apr. 3, 1933.

127. Decimal File 1930-39, Department of State, National Archives, 711.42152/384 & 385, Letters from American Engineering Council to Hull and Roosevelt, May 29, 1933.

With the vital matters that faced Roosevelt during this period he had no time to concern himself with the problems of the Commission. To the several Senators who were urging the need for reform, Secretary Hull could only reply that several proposals had gone to the President but he had not given his approval to changes in the present set-up. The Secretary could take the initiative only with the prior approval of the President.[128]

Meanwhile the Commission existed with little to engage its time. Lorton was becoming disillusioned and went so far as to suggest to the President certain matters which should be referred.[129] Hearst was doubtful that this was the proper approach for the Commission to obtain attention and respect.[130] Burpee felt the best way was to publicize the Commission through articles and statements of the heads of governments.[131] The State Department thought it would take more than publicity to bring the Commission back to life. Indeed, the legal adviser thought it undesirable to issue statements designed to propagandize the Commission. Appreciation of it must come from its accomplishments; these were not particularly great and the Commission s work should not be overrated.[132]

Nor was the President moved by the pleas of his Minister in Ottawa and of an eminent Harvard professor. The

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128. Decimal File 1930-39, Department of State, National Archives, 711.42152/406a, Letter from Hull to Senator M. Sheppard, May 12, 1934.

129. Decimal File 1930-39, Department of State, National Archives, 711.42152/484½, Letter from Lorton to Roosevelt, June 17,1936.

130, I.J.C., Can. Sect. File, Hearst Papers, General File, Jan. 1934-Sept. 1935, Letter from Magrath to Hearst, May 15, 1935; Letter from Hearst to Magrath, May 16, 1935.

131. Decimal File 1930-39, Department of State, National Archives, 711.42152/461, Letter from Burpee to Phillips, Nov. 29,1935.

132. Decimal File 1930-39, Department of State, National Archives, 711.42152/461, Memorandum from Western European Div. to Phillips, Dec. 4, 1935; Memorandum from Legal Adviser to Western European Div., Dec. 5, 1935.

Minister, learning that some of the United States members were engaging in the political campaign of 1936, suggested that the President should be approached

> . . . urging removal of the Commission from politics and to have our members appointed for life, more or less along the lines of the Supreme Court. This would not only improve the caliber of the Commission, but would probably result in both Governments referring to the Commission matters of more importance. As it is now (I believe I am correct) we hesitate to refer to the Commission questions of prime importance on account of the uncertainty as to the membership of the Commission, particularly of our own section.[133]

The Under Secretary agreed but noted that he had been trying for several years to bring about the desired changes.[134]

Professor W.Y. Elliot of Harvard saw the malaise of the Commission as symptomatic of the lack of interest by the United States in Canadian problems generally. Due to this attitude by President Roosevelt, he wrote, the Commission "threatens to lapse into innocuous desuetude after days of great usefulness."[135]

Nothing further transpired until 1939 when the President decided the time had come to act in relation to the Commission. The legal adviser originated a plan of reorganization based upon his intimate knowledge of the Commission. Because, it was his impression, the Commission was not very active, there was no reason why the commissioners' positions might not be filled by regular officials of the government without additional compensation being needed. While the officials so designated should not all come from the State Department, ("this might,

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133. Decimal File 1930-39, Department of State, National Archives, 711.42152/484, Letter from N. Armour to Wm. Phillips (strictly confidential), June 18, 1936.

134. Decimal File 1930-39, Department of State, National Archives, 711.42152/484, Letter from Phillips to Armour, U.S. Legation, Ottawa, June 22, 1936.

135. I.J.C., Can. Sect. File E-16, Letter from Elliot to Burpee, Oct. 28, 1936; W.Y. Elliot, "Neighboring Up to Canada", Christian Science Monitor, Dec. 29, 1936.

in the eyes of the Canadian Government, tend to deprive the Commission of an attitude of impartiality") there was no objection to the chairman being the counselor of the Department. The others might be an Army engineer and an assistant Attorney General. Since such a move would provide considerable savings to the government,

> . . .[t]he only drawback to such an arrangement that I now think of is the fact that there might arise a possible feeling on the part of Canada of a waning interest on our part in the Commission and its work. I am inclined to think, however, that such a change, if competent people were selected as Commissioners, would in fact strengthen the Commission.[136]

Hackworth's proposal was greeted with general favour by the Department. Most agreed that such a move would revitalize the Commission.

> . . . [W]e have never had a satisfactory type of Commissioner on the International Joint Commission. Moreover . . . the Canadian personnel has usually been of a somewhat higher level of ability than ours, although the present disparity is considerably less than it has been in the past. Both Governments have adopted the unfortunate habit of appointing to the Commission politicians who either failed of re-election to Congress or Parliament or for some reason did not fit into their former political jobs. For a number of years all three of our Commissioners were former Senators, and at the present time we have one former Senator on the Commission . . . .

The only doubt was that the Canadians would find the plan objectionable.

> . . . The Canadians might take the position that by following this procedure the two Governments have set up a sort of buffer organization not so directly influenced by the point of view of their respective Governments as would be the case should either or both Governments appoint regular governmental employees to represent them.[137]

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136. Decimal File 1930-39, Department of State, National Archives, 711.42152/527, Memorandum from Green H. Hackworth to Hull, May 1, 1939.

137. Decimal File 1930-39, Department of State, National Archives, 711.42152/524, Memorandum from Phillips to Hickerson, May 6, 1939; 711.42152/525, Memorandum from Hickerson to Messersmith (personal and strictly confidential), May 12, 1939.

While it was felt that the result of such a change could only make for a stronger and more active Commission, an alternative to be considered if the Canadians objected might be to place the Commissioners on a per diem basis, remove the present members and appoint in their stead an outstanding international lawyer, a distinguished civil engineer and a public citizen from the business world.[138] The Secretary was asked by the President to approach the Canadian Government informally to ascertain its feelings in the matter.[139]

While the Commission had had little to do in recent years and seldom received an "important" case, the Secretary observed, it must nevertheless not be overlooked that it was important to have a body capable of dealing with difficult and highly technical questions. With this in mind the President had decided to undertake "certain changes in the present personnel of the American Section of the Commission."

> It is the President's opinion that the work of the Commission could best be carried out by a body of experts. In attempting to appoint such people from private walks of life, one immediately encounters the difficulty that appointment to the Commission is not sufficiently attractive from the standpoint of public service or personal honor to entice the desired people to take the positions. The President is considering, therefore, supplanting the American Commissioners on the International Joint Commission by high ranking Government officials who would receive no extra compensation for their work on the Commission other than per diem and necessary travelling expenses during hearings. It is felt that the Counselor of the Department should be the Chairman of the American Section and that the other two places might well be filled by an Army engineer and an Assistant Attorney General. Under normal circumstances it is believed that these officials will be able to carry out the work of the Commission in addition to their present

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138. Decimal File 1930-39, Department of State, National Archives, 711.42152/525, Memorandum from Hickerson to Messersmith (personal and strictly confidential), May 12, 1939.

139. Decimal File 1930-39, Department of State, National Archives, 711.42152/526, Memorandum from Messersmith to Hackworth, (strictly confidential), May 18, 1939.

> duties. In the event that important cases requiring extended hearings should arise, however, it is intended that the officials in question will be relieved of their present duties for such periods of time as may be necessary.

The Secretary requested the Minister in Ottawa to take the matter up with the Prime Minister personally to ascertain if the Canadian Government would be willing to undertake a similar change or, if not, if they would object seriously to the proposed change in the United States section.[140]

Roper reported promptly on the attitude of the Canadian Prime Minister.

> The Prime Minister, after giving careful attention to these tentative proposals, said that in the first place he had the highest regard for the importance of the International Joint Commission as an outstanding organization and as having an importance in international affairs which was increasingly regarded as symbolic of what nations with good will toward each other might accomplish in the way of machinery for settling their disputes. He said that he could think of no one organization on our whole continent which was so important in this respect.
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> Mr. King said that he considered it highly important to have an efficient and trained personnel to represent Canada on this important Commission. He said that one element of importance in choosing its membership was, in his mind, that of stability and relative permanence of tenure of office. With this in mind, he said that the Canadian Commissioners had been very carefully picked, that one of its members was a former Provincial Prime Minister, and that there was in the minds of the present three Commissioners a kind of indefinite, though clearly recognized understanding that in the normal course of events their tenure of office would not be disturbed by political changes throughout the course of the years. In these circumstances, it was his immediate reaction that the Canadian Government would not be likely to decide on any sudden change in the personnel of its three Commissioners; that in the event that it was decided to replace them by technical experts of the Government, he felt that such changes would be made only gradually and

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140. Decimal File 1930-39, Department of State, National Archives, 711.42152/527 & 522, Despatch from Hull to D.C. Roper, U.S. Minister, Ottawa (personal and confidential), July 25, 1939; 711.42152/527½, Memorandum from Western European Div. to J.F. Simmons, U.S. Legation, Ottawa (personal and strictly confidential), July 25, 1939.

> singly, after termination of the services of any one of the members in the normal course of events.
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> As to the advisability of having Government experts as opposed to permanent people chosen from private life, Mr. King said that there were strong arguments on both sides of this question, but he felt that the Canadian Government would not wish to lose sight of the independence of position which might be enhanced and contained by the non-Governmental composition of the Commission.

The report concluded by noting that while the Prime Minister wished to consult with his Cabinet colleagues before giving any commitment as to the nature of the appointees, he could assure the Minister that the Government had no objection whatever to the United States' plans for reconstituting its section.[141]

The President decided to move almost immediately with the changes, but would make them one at a time. The Under Secretary advised him to appoint an Army engineer first, an Assistant Attorney General second and the new chairman from the State Department (the counselor) last. He also suggested the order for removal of the present members of the Commission.[142] The President wondered if someone from the Federal Power Commission rather than from the Army Engineers might be more appropriate. Likewise, would not a legal counsel from the Interior Department or Federal Power Commission be preferable to one from Justice?[143]

At this point a further report from the Minister in Ottawa indicated that the Canadian Government was not about to go along with the reorganization. Indeed,

> . . . he [King] had come to the opinion that there was a definite advantage in keeping the personnel of this

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141. Decimal File 1930-39, Department of State, National Archives, 711.42152/522, Despatch from Roper to Hull, July 29, 1939.

142. Decimal File 1930-39, Department of State, National Archives, 711.42152/522, Memorandum from Under Secretary Welles to Roosevelt, Aug. 2, 1939; Memorandum from Roosevelt to Welles, Aug. 3, 1939; Memorandum from Welles to Head, Western European Div., Aug. 4, 1939; Memorandum from Welles to Roosevelt, Aug. 9, 1939.

143. Decimal File 1930-39, Department of State, National Archives, 711.42152/522, Memorandum from Roosevelt to Welles, Aug. 13,1939.

> important Commission separated from the administration of the Government in power . . . . He even went so far as to indicate a certain amount of regret that there might be some prospect of a substitution, on the American side of the Commission, of departmental representatives for its present personnel chosen from outside life.[144]

The President had made his decision however and requested the resignation of Lorton so that he could appoint a "specialist from the Government to deal with the new, specialized and technical matters to come before the Commission."[145] Lorton complied[146] and, on the recommendation of Hull, R.B. McWhorter, chief engineer with the Federal Power Commission was appointed as commissioner without pay.[147]

In early October the President requested Hull to inform the remaining two members of the Commission that they would shortly be asked to resign.[148] Anticipating the request, Bartlett submitted to the President his resignation which was accepted effective October 31.[149] Stanley took no action although he did comply with a request of the President to appoint an executive assistant to the commissioners in order

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144. Decimal File 1930-39, Department of State, National Archives, 711.42152/529, Despatch from Roper to Hull (personal and confidential), Aug. 19, 1939.

145. Decimal File 1930-39, Department of State, National Archives, 711.42152/529, Letter from Roosevelt to Lorton, Aug. 25, 1939.

146. Decimal File 1930-39, Department of State, National Archives, 711.42152/530, Telegram from Lorton to Roosevelt, Aug. 27, 1939; 711.42152/556, Letter from Lorton to Roosevelt, Sept. 5, 1939.

147. Decimal File 1930-39, Department of State, National Archives, 711.42152/522, Letter from Hull to Roosevelt, Oct. 3, 1939; 711.52152/536, Memorandum from Hickerson to Under Secretary Oct. 26, 1939.

148. Decimal File 1930-39, Department of State, National Archives, 711.42152/522, Note from Hull to Roosevelt, Oct. 4, 1939; 711.42152/551, Memorandum from Roosevelt to Hull, Oct. 5, 1939; I.J.C. Can. Sect. File E-16, Letter from Ellis to Burpee (confidential), Oct. 19, 1939.

149. Decimal File 1930-39, Department of State, National Archives, 711.42152/555, Letter from Bartlett to Roosevelt, Oct. 14, 1939.

to strengthen the staff of the United States section.[150]

Reaction to the President's announcement[151] of the reorganization was not altogether favourable. At least one paper compared this move to his earlier attempt to "pack" the Supreme Court--in this case, to get the seaway project moving. It was another attempt by Roosevelt, said the Tribune, to dominate the supposedly independent agencies.[152] In a memorandum prepared by Burpee for the Canadian chairman and the Prime Minister, it was suggested that appointments from the federal service were contrary to the basic principle of the Commission.

> That principle is that the Commissioners should not only be men of the highest integrity, but there should be nothing to prevent them from giving the most impartial consideration to the questions coming before them, no official or other obligation to judge the problem from a national instead of from an international standpoint.... Is it possible for a man who in one capacity is responsible to higher officials to act with strictly judicial impartiality in another capacity, perhaps in a case that may directly concern the department of which he is an officer?

He felt that the Canadian Government had always consciously sought to avoid trying to influence its commissioners except in open argument before the whole body. The commissioners were required to sever all connections with the government. "To set up against the Canadian Section so constituted an American Section composed entirely of government officials would seem to me at the very least discourteous to the Canadian Government." Burpee also disagreed with Roosevelt's view that technical men were now essential. While engineering problems were always involved, he though the wisest practice was

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150. Decimal File 1930-39, Department of State, National Archives, 711.42152/544, Letter from Stanley to Hull, Oct. 25, 1939.

151. Decimal File 1930-39, Department of State, National Archives, 711.42152/548, Summary of President's Press Conference, Oct. 27, 1939.

152. I.J.C., Can. Sect. File E-16, Chicago Tribune, Oct. 27, 1939.

> . . . to appoint as Commissioners men of political experience, accustomed to dealing with public questions and all classes of people, men of common sense and a judicial frame of mind; and then let them call to their aid from time to time for advice men whom are acknowledged experts from whatever field is under consideration.[153]

The Canadian commissioners chose to say nothing but Burpee assured the secretary of the United States section that the Canadian Government had no intention of abrogating the treaty as a result of the United States action.[154] The Department of External Affairs was not pleased with the change. Skelton after talking with King met with an officer of the United States legation to express official disapproval. According to Skelton, King had never agreed to the change, fearing that the "prestige and effectiveness of the Commission would be jeopardized if its present composition were changed." Neither, he felt, could it retain the "independent and judicial attitude which was its essential feature." It was really in the interest of both governments to maintain the Commission "as a buffer which could deal with any tangled questions without involving the governments directly in their determination."[155]

The officer reported that Skelton shared King's views but felt that it was probably too late to expect the President to reconsider his decision. This being the case, Skelton thought that it would only be a matter of time before the Canadian section of the Commission was changed to correspond with the United States section.[156] On the basis of this report, Hull advised the President to make no changes in his programme for reorganization of the United States section of the Commission.[157]

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153. I.J.C., Can. Sect. File E-16, Memorandum prepared by Burpee, Oct. 27, 1939.

154. I.J.C., Can. Sect. File E-16, Letter from Hearst to Burpee (confidential), Oct. 28, 1939; Letter from Ellis to Burpee, Oct. 29, 1939; Letter from Burpee to Ellis, Oct. 30, 1939.

155. King Papers, unnumbered, Memorandum from Skelton to King, Oct. 27, 1939; Canada, Department of External Affairs, File 1514-40, Memorandum of the Department, Oct. 30, 1939.

156. Decimal File 1930-39, Department of State, National Archives, 711.42152/545, Letter from D. Key, U.S. Legation, Ottawa to J.D. Hickerson (personal and confidential), Oct. 30, 1939.

157. Decimal File 1930-39, Department of State, National Archives, 711.42152/545, Note from Hull to Roosevelt, Nov. 10, 1939.

The President did proceed. Although Stanley gave no indication of any intention to resign, the counselor of the State Department, R.W. Moore was appointed a commissioner in December and the Bureau of the Budget was informed that a salary need be provided for only one commissioner and, in the following year, for none. The Secretary indicated that the President had decided to slow down the change in face of the Canadian objections, but would not be happy until all of the commissioners were appointed from the federal service.[158]

E. The Commission 1940-1966

It was soon apparent that complete reorganization of the United States section of the Commission was not possible and, indeed, not desirable. It was equally evident that there was some dissatisfaction with the changes already made. The result in part at least was that during the war years and beyond the Commission languished unattended, with only two commissioners on each section. Not until 1948 were further efforts made to rejuvenate the body.

Stanley marshalled considerable support in Congress for his struggle to retain the chairmanship of the section and the President, aware of this,[159] and having seen the new plan in operation for a few months, decided to allow Stanley to remain and to make provision for one of the three commissioners to be paid a full salary.

> The experience of several months during which there have been . . . one full time salaried Commissioner and two Commissioners who are also the incumbents of other important Government offices- is believed to have

158. Decimal File 1930-39, Department of State, National Archives, 711.42152/553, Memorandum from Hackworth to Hickerson, Nov. 10, 1939; Memorandum from Hull to Roosevelt, Dec. 29, 1939, 711.42153/513A, Memorandum from State Department to Director of the Bureau of the Budget, Nov. 8, 1939.

159. Decimal File 1940-44, Department of State, National Archives, 711.42152/560, Letter from Senator P. Harrison to Roosevelt, May 22, 1940.

> definitely demonstrated the impracticality of conducting the work of the Commission efficiently and effectively, unless there shall continue to be after June 30, 1940, an appropriation and authority to pay the salary of one Commissioner, who will devote full time to the work of the Commission and be in attendance at the headquarters of the Commission when not engaged in field work.

The President also wished legislation to make it clear that all three commissioners "shall hold office only for such period as the President may determine and may freely be removed and replaced at his pleasure."[160]

Shortly after this reversal of policy, Moore died in early 1941 and, although several including the United States Boundary commissioner[161] sought appointment to fill the vacancy, no further action was taken until the end of 1948.

The Canadian commissioners were privately unhappy over the change in the United States section in 1939 and after the first meeting of the "new" Commission, Hearst noted how different and difficult the relations between the two sections had become.

> . . . The very idea of the Chairman of the Canadian Section of one of the most important international organizations on the American Continent, if not in the world, having to sit around cooling his heels while American Commissioners attend to some work that the Government by whom they are employed requires to be done. I have been on this Commission for over 20 years, and during that time almost every case developed sooner or later into a contest between the two governments. To me the situation seems too ridiculous for words, that the United States section of the Commission hereafter is to be made up of men in the employment of the United States Government. How can you expect these men to be independent when their bread and butter depends on the goodwill of the American Government?[162]

Shortly thereafter, Hearst submitted his resignation, commenting:

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160. Decimal File 1940-44, Department of State, National Archives, 711.42152/560, Note from R.W. Moore to Roosevelt, June 5, 1940; 711.42153/513A, Letter from Under Secretary to the Director of the Bureau of the Budget, June 5, 1940.

161. Decimal File 1940-44, Department of State, National Archives, 711.42152/582, Letter from T. Riggs to Hull, Feb. 14, 1941.

162. I.J.C., Can. Sect. File E-16, Letter from Hearst to Stewart, Apr. 15, 1940.

> . . . [T]here appears to me to be a tendency in later years to divide the Commission into two parts rather than to work together as one body. This . . . is a mistake, and one that should be resisted as far as possible. The Commission, as I look on it, is not made up of two parts, but of one organization, and should work together as closely as possible.[163]

He was replaced by J.E. Perrault a former Liberal Cabinet minister in the Quebec Government.[164] No sooner was this appointment made than Kyte died in November. His vacancy was not filled until late in 1947, a year after a second vacancy had occurred in the Canadian section with the death of chairman Stewart in December 1946.

With the death of the Canadian chairman the Commission was without a quorum. The State Department, pointing out that there were a number of references ready to submit to the Commission, requested that the Canadian Government appoint at least one member so that the Commission could function again. There were repeated urgings from W.R. Vallance,[165] State Department counsel, who had recently been designated counsel for the United States section and who took an active interest in the Commission and its work, instituting the practice of submitting to the Department full reports on the meetings of the Commission. Only after the press had taken the Canadian Government to task for its dereliction[166] did the Prime Minister act, appointing George Spence, a former Liberal Member of Parliament and cabinet minister in the Saskatchewan Government, to fill one of the vacancies and designating Perrault as acting chairman of the section.[167]

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163. I.J.C., Can. Sect. File E-16, Letter from Hearst to Stewart, Oct. 7, 1940.

164. Canada, Department of External Affairs, File 2492-B-40, Memorandum from King to Skelton, June 15, 1940; Memorandum from Skelton for file, Sept. 25, 1940; Decimal File 1940-44 Department of State, National Archives, 711.42152/572, Note from Canadian Legation, Washington to Hull, Oct. 4, 1940.

165. Decimal File 1945-49, Department of State, Central Files, 711.42155/9-946, Letter from Vallance to R. Atherton, U.S. Minister, Ottawa, Dec. 30, 1946; 711.42155/4-2147, Memorandum from Vallance to C. Fahy, Legal Adviser, Apr. 18, 1947; Canada, Department of External Affairs, File 2492-B-40, Letter from J. Harrington, U.S. Minister to Pearson, Aug. 28, 1947.

166. I.J.C., Can. Sect. File E-16, Montreal Gazette, Aug. 28, 1947.

167. Canada, Department of External Affairs, File 2492-B-40, Memorandum from Under Secretary to Prime Minister, Sept. 22, 1947; Privy Council Order, Oct. 1, 1947.

With the reference of a number of matters to the Commission there was a general revival of interest in the body on both sides in 1948. In Canada, consideration was being given to an upward revision in the salaries of the commissioners to bring them more into line with those of the United States commissioners. The reaction of the Under Secretary of State was favourable when he discovered that the work of the commissioners was indeed full-time.[168] However, when he recommended favourable consideration of the proposal, his Minister indicated that the "[w]hole future policy with respect to the Board is under consideration" and salaries would be dealt with in the context of the wider question of what was to be done about the Commission.[169]

At this point Perrault died, reducing the Canadian section again to one member. Discussions were held at the cabinet level about reconstitution of the Commission and it was agreed that this should be done--particularly the appointment of someone with an engineering background.[170] The Prime Minister indicated that he would make no appointments, leaving the decision to the new Prime Minister following the party leadership convention in August.[171] Following formation of the new ministry under St. Laurent, there was further consideration, the general consensus appearing to favour the appointment of at least one outstanding engineer.[172] The Financial Post strongly urged avoidance of political appointments.[173] However, when the appointment was

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168. Canada, Department of External Affairs, File 2492-B-40, Memorandum from Pearson to St. Laurent, May 20, 1948.

169. Canada, Department of External Affairs, File 2492-B-40, Memorandum from Pearson to St. Laurent (with penned reply from Minister), May 20, 1948.

170. Canada, Department of External Affairs, File 2492-B-40, Letter from C.D. Howe to St. Laurent (personal), July 6, 1948.

171. Canada, Department of External Affairs, File 2492-B-40, Memorandum from E.R. Hopkins to Pearson, July 13, 1948.

172. Canada, Department of External Affairs, File 2492-B-40, Memorandum from Escot Reid to Pearson (confidential), Oct. 7, 1948.

173. I.J.C., Can. Sect. File E-16, Financial Post, Dec. 11, 1948.

announced December 24, 1948, the new commissioner, subsequently designated chairman of the section, was J. Allison Glen, former minister and speaker in the King Cabinet, who had recently retired at 71 years of age.[174] The Engineering Institute of Canada and the press were highly indignant over this appointment. As well as not being an engineer, the editors felt that Glen, at 71 and in poor health, would not contribute much to the Commission.[175]

One year later, the Canadian section was brought to full strength with the naming of General A.G.L. McNaughton as a commissioner.[176] The commander of Canadian forces during the war and briefly a minister in the King Cabinet, his appointment was widely welcomed in both countries for he was not only an eminent Canadian statesman but also a well respected engineer.

The United States felt that it was high time to fill the seven year vacancy in its section--particularly in view of the fact that the present chairman had been there since 1930 and was now eighty-one years old. The questions were how to replace the aged chairman and from where to fill the vacancies--from within or without the federal service? The feeling was that Stanley should be removed and all three appointments should be made from within--the Legal Adviser of State, the Chief of the Army Engineers and a third, rotational appointment from the Federal Power Commission and from Interior. However, in view of the long practice of appointments from among retired Senators, this might be difficult to accomplish. Therefore, perhaps the most desirable plan might be to have all three commissioners selected from outstanding men outside the federal service.[177] The recommendation reaching

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174. Decimal File 1945-49, Department of State, Central Files, 711.42152/12-2448, Telegram from U.S. Embassy, Ottawa to Secretary of State, Dec. 24, 1948.

175. Canada, Department of External Affairs, File 2492-B-40, Telegram from Engineering Institute to St. Laurent, Dec. 28, 1948; I.J.C., Can. Sect. File E-16, Toronto Globe and Mail, Dec. 29, 1948; Montreal Gazette, Dec. 28, 1948.

176. Canada, Department of External Affairs, File 2492-B-40, Privy Council Order 387, Dec. 21, 1949.

177. Decimal File 1945-49, Department of State, Central Files, 711.42155/6-1548, Memorandum from E.T. Wailes, Commonwealth Div. to J.D. Hickerson, Western European Div. (secret), June 15, 1948; 711.42155/6-1648, Memorandum from Hickerson to Wailes (secret), June 16, 1948.

the Secretary however merely suggested that the President be urged to appoint an officer from the Army Corps to fill the present vacancy.[178] This the Secretary recommended to the President[179] and in October Truman approved the appointment of Eugene Weber, a civilian engineer with the Corps.[180]

During the last fifteen years a number of important events have occurred and several proposals have been made in both countries all of which have had some bearing and effect on the International Joint Commission. In Canada the most interesting and significant aspects have been the question of appearances of the commissioners before Parliamentary committees, the terms of appointment for the commissioners, the reorganization legislation of 1952, the problem of commissioners engaging in policy matters, the nature of appointments to the Canadian section and the reporting on Commission affairs within the Department of External Affairs. Each of these matters illustrates to some extent the relationship between the Commission (or a section thereof) and the government.

From the outset in the United States it was the common practice for the chairman or other member of the Commission to be called before the Appropriations Committee of the House each year to explain and defend the amount of funds being requested and often, to attempt to justify the continued existence of the Commission. On frequent occasions he has also been called before the Senate Foreign Relations Committee, particularly when there was some important matter between the two countries in which the Commission was involved. In Canada, until 1952, quite the reverse had been the case. The annual appropriation for the Canadian section was fixed by statute as were the salaries.

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178. Decimal File 1945-49, Department of State, Central Files, 711.42155/6-2148, Memorandum from E.A. Gross to Acting Secretary Lovett, June 22, 1948.

179. Decimal File 1945-49, Department of State, Central Files, 711.42152/9-848, Note from Lovett to Truman, Sept. 17, 1948.

180. Decimal File 1945-49, Department of State, Central Files, 711.42152/10-448, Memorandum from Truman to Lovett, Sept. 29, 1948.

Thus, there was no need to argue for annual support. In addition, as Brooke Claxton noted in defending the Commission during the Red River flood debate in 1950, the attitude had always been that it would be quite improper for a member of an international commission to appear before a committee of the House, particularly while the matter in question was under study by the international body.

> . . . I suggest that this would end the usefulness of the commission as an international organization which has been remarkably successful and which has presented an example to the whole world of the way in which two countries can cooperate. One of the secrets of its success has been the fact that it has been objectively representative of both countries, and that its recommendations have always been carried out.[181]

However, in his appearance before the External Affairs Committee later the same year, Pearson agreed that a member of the Commission might appear before the Committee to discuss with them matters with which the Commission was currently dealing.[182]

In 1952, the government introduced an amendment to the Boundary Waters Treaty Act which, when enacted, removed the appropriation for the Commission from the statute and made it subject to an annual appropriation by Parliament.[183] In the same year, the chairman of the section began what has now become virtually an annual appearance before a committee of the House or Senate--most frequently before the External Affairs Committee--to explain in some detail the nature and extent of the work in which the Commission is engaged and to answer any questions which members of the Committee may have concerning the work or amounts of funds requested by the Commission.

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181. Canada, Parliament, House of Commons Debates, 21st Parliament, 2d Session, vol. 3, pp. 2825-2827, May 25, 1950.

182. Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 21st Parliament, 2d Session, June 13, 1950.

183. Canada, Parliament, House of Commons Debates, 21st Parliament, 6th Session, vol. 3, pp. 2973; 3095; 3102-3108, June 6, 1952; Canada, Department of External Affairs, File 2492-C-1-40, Memorandum from S.D. Hemsley to K. Burbridge, Jan. 15, 1952.

The 1952 amendment to the Act also provided for increases in the salaries of the commissioners and for a greater amount for the person elected chairman of the section. The maximum amounts authorized were $15,000 for the chairman and $10,000 for each of the other commissioners. Finally, the amendment placed the secretary and the staff members of the section under the jurisdiction of the Civil Service Act--a change which had been successfully opposed in 1918 as being out of character with the nature of the Commission. As justification for the salary increases, Pearson advanced the following reasons: the increased work load of the body, the increased importance of matters being dealt with by the Commission, and the need for an upward revision of the salaries after forty years at the same level. He observed that while in the past the jobs had not been considered full-time, suchwas no longer the case. All three commissioners would henceforth be appointed on a full-time basis.[184]

In 1950 the government also considered the possibility of making appointments to the Commission for fixed terms. The major obstacle was that the Commission was a quasi-judicial body and hence the argument was that appointments should be of the same duration as judicial appointments. Although the Prime Minister was anxious that a fixed term should be placed in the statute, the officers of the Department felt that it might be unwise; that preferable might be a renewable term certain.[185] The commissioners were opposed to any such proposal, arguing for a permanent status similar to that of a judge.[186] No legislation was adopted in relation to the matter but, since 1956 the practice of fixed terms seems to have been adopted in connection

184. Canada, Parliament, House of Commons Debates, 21st Parliament, 6th Session, vol. 3, pp. 2973; 3104-3105, June 6, 1952.

185. Canada, Department of External Affairs, File 2492-B-40, Memorandum from Pick to J.S. Nutt (secret), July 19, 1950; Memorandum from Burbridge to Moran (secret), Aug. 4, 1950.

186. Canada, Department of External Affairs, File 2492-B-40, Letter from J.L. Dansereau to St. Laurent, March 1951.

with appointments and renewals except in relation to the term of the commissioner designated chairman.

Beginning in 1954 an increasing interest by the Department of External Affairs in the work and functioning of the Commission was evidenced by the reports prepared for the Department by the officer responsible for the Commission. This reporting followed a practice implemented some years earlier in the Department of State. The report in early 1954, reviewing the past work of the Commission, concluded that "the interests of Canada and the United States in boundary matters will be served in direct ratio to the ability, intelligence and wisdom of the Commissioners appointed." In another report later the same year, the officer gave a detailed analysis of the personalities involved in the Commission and made suggestions as to how he thought the Commission could be made to operate most effectively. He felt it was essential to keep controversial matters from the purview of the body and that the Department should continue with the research studies which they had begun in that year dealing with matters before the Commission. The Under Secretary liked the suggestions but noted that implementation would require "the maximum finesse in view of the long record of 'freewheeling' by the Commission." In subsequent reports, the officer gave lengthy observations on the Commission which could only have been of assistance to the government in determining the desirable course in dealing with the Commission.[187] The practice of submitting such reports appears, however, to have been abandoned.

The matter of the commissioners acting as negotiators rather than as investigators and adjudicators has been dealt with

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187. Canada, Department of External Affairs, File 2492-D-40, Memorandum from E.A. Coté on the IJC, Jan. 18, 1954; File 2492-A-1-40, Memorandum from Coté to Under Secretary (restricted) Apr. 28, 1954; Memorandum from Coté to Under Secretary (confidential), Apr. 14, 1955; Memorandum from Coté to Under Secretary, Feb. 3, 1955; Memorandum from Coté to Under Secretary (restricted), June 21, 1954; Memorandum from Coté to Under Secretary, Oct. 15, 1954.

earlier and requires only brief mention here. The matter was very much in focus during the deliberations of the Commission relating to the Columbia River. And, in the same way as he saw the sections of the Commission performing two separate functions, General McNaughton also visualized the role of the commissioner as dual. He made this clear in an appearance before the External Affairs Committee.

> I made it a condition of entering discussions in Washington [within the Commission relating to the Columbia River reference] that those discussions would not be regarded as closed discussions but that the record when it became available might be tabled by me for this committee in order that this committee might know what their witness was doing between sessions, and also how we were conducting these important negotiations and the principles which were involved.[188]

The appointment of McNaughton to the Canadian section did not still all criticism of the lack of qualifications of the personnel of the Commission. During the Winnipeg flood debates in the House, several complaints were voiced. One member felt that

> . . . so far as Canadian appointments to the international joint commission on water rights are concerned, many people consider this a lucrative pension scheme to certain people for past faithful service. Personal friends of mine, who rendered service for three score years and ten and were then in ill health, have been appointed to the Commission . . . . There is great dissatisfaction in this regard among people well acquainted with these flood problems. In fact the engineers' association has publicly protested this method of appointment.[189]

With the death a month later of Glen, the Leader of the Opposition urged the appointment of a highly qualified engineer to replace him. He noted that the present composition of the United States section recognized the importance which that country attached to the need for engineering skills on

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188. Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 22nd Parliament, 2d Session, June 1, 1955.

189. Canada, Parliament, House of Commons Debates, 21st Parliament, 2d Session, vol. 2, pp. 2030-2031, May 1, 1950.

the Commission. The Secretary of State for External Affairs while acknowledging the need for a high degree of competence, denied that the Canadian section had lacked this in the past.[190]

The Canadian Government after giving consideration to suggestions that the new chairman should be an eminent lawyer, decided that instead, it would appoint another engineer to the section and "recommend" the election of McNaughton as chairman. On July 12, the appointment of J. Lucien Dansereau, formerly an engineer with the federal service and a supporter of the Liberal party from Quebec, was announced and a week later McNaughton was chosen as chairman.[191]

In 1955, the government decided that the terms of two of the commissioners, Spence and Dansereau, would expire at the end of the year. Concern was expressed by the commissioners that such action was inimical to the best interests of the Commission since it interfered with the quasi-judicial nature of the appointments. Further, it would be disruptive of the desirable continuity within the section. The chairman was asked to intercede.[192] The chairman agreed with the points made but was reluctant to intervene, feeling that terms of service were matters of governmental policy.[193] He simply forwarded the correspondence to the External Affairs Minister and in December the terms of the commissioners were extended for one year.[194] Another one year term followed.

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190. Canada, Parliament, House of Commons Debates, 21st Parliament, 2d Session, vol. 4, pp. 4397-4399, June 29, 1950.

191. Canada, Department of External Affairs, File 2492-B-40, Memorandum from Under Secretary Heeney to Pearson (confidential), June 28, 1950; Press Release, July 13, 1950.

192. Privy Council Order 1955-1042, July 12, 1955; I.J.C. Can. Sect. File E-16, Letter from Spence to McNaughton, Nov. 10,1955.

193. I.J.C., Can. Sect. File E-16, Letter from McNaughton to Spence, Nov. 13, 1955.

194. I.J.C., Can. Sect. File E-16, Letter from McNaughton to Pearson, Nov. 14, 1955; Privy Council Order 1893, Dec. 22, 1955.

In 1957 the new administration gave brief consideration to a reorganization of the Commission. With a view to accomplishing this, the term of Spence was not renewed beyond the end of 1957.[195] The Minister of National Resources, while believing that the desirable composition of the section would be a lawyer, an engineer and a political member, suggested that in view of the chairman's age, it might be wise to appoint a second and younger engineer. He recommended D.M. Stephens of Winnipeg, an engineer who had at one time been Deputy Minister of Mines in Manitoba and was now chairman of Manitoba Hydro.[196] He accepted an appointment for a one year term.[197]

The Canadian section was now composed of three engineers. This imbalance was noted and it was suggested that consideration might be given to the appointment of a lawyer.[198] The situation was decried by two writers observing the reluctance of the Commission to grapple with legal issues in recent years. Suggesting that this was due to the lack of legal minds, they went on:

> . . . It is rather disquieting that a body which has an important judicial role in the relationship between two large nations, and which also acts in an investigative capacity in regard to questions involving complex and important legal issues, should, at the very moment when it is seised of some of the most difficult issues ever to come before any international body, number not a single lawyer in its membership. This is a far cry from the early years when five of the Commissioner's six members belonged to the legal profession.[199]

The advice was not heeded by the government. It continued to renew the existing appointments from year to year. Nor

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195. I.J.C., Can. Sect. File E-16, Letter from Sidney Smith to Spence, Dec. 24, 1957.

196. Canada, Department of External Affairs, File 2492-B-40, Letter from Smith to Hamilton (confidential), Dec. 12, 1957; Letter from Hamilton to Smith (personal and confidential), Dec. 17,1957.

197. Canada, Department of External Affairs, File 2492-B-40, Privy Council Order 1958-23, Jan. 2, 1958.

198. Canada, Department of External Affairs, File 2492-B-40, Memorandum to the External Affairs Minister (confidential), Oct. 23, 1958.

199. Bloomfield, L.M. & Fitzgerald, G.F. Boundary Waters Problems of Canada and the United States Toronto, Carswell, 1958, p.62.

did it accept the recommendation of the Borden Royal Commission that one of the members of the proposed National Energy Board be appointed as a member of the Canadian section of the Commission. In the view of the Minister of Trade and Commerce such a step would be inconsistent with the principle that a quasi-judicial body should not have as a member a representative of a body which might be directly interested in proceedings before it.[200]

Dansereau submitted his resignation to the government on June 1, 1961. In February of the following year the government announced the appointment of René Dupuis, a Montreal engineer and former member of the Quebec Hydro-Electric Commission.[201] At the same time General McNaughton agreed to retire on April 15, the fiftieth anniversary of the Commission and shortly after his seventy-fifth birthday which, in the view of some was the mandatory retirement age for members of the Canadian section under the recent amendment to the judges' retirement section of the BNA Act. On April 10 his retirement was announced and on the same date the appointment of A.D.P. Heeney, a senior public servant and twice Canadian Ambassador to Washington, as commissioner and chairman-designate was made.[202]

In January 1966, the government announced the reappointment of Dupuis and Stephens for a further two year term.[203] At the same time the legal adviser to the Canadian section was given the additional new post of Assistant to the Chairman.

In the United States since 1950 there has been little occupation with the need for changes in the structure or role of the Commission. There has, however, been some concern with the internal aspects of the United States section, and on at least two occasions, proposals have been advanced for a merger of the

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200. Canada, Parliament, House of Commons Debates, 24th Parliament, 2d Session, 1959, vol. 4, p. 3924.

201. Decimal File 1960-64, Department of State, Central Files, 611.4232/2-2862, Telegram from U.S. Embassy, Washington to Secretary of State, Feb. 28, 1962.

202. Decimal File 1960-64, Department of State, Central Files, 611.42311/4-1062, Telegram from Merchant, U.S. Embassy, Ottawa, to Secretary of State, Apr. 10, 1962.

203. Decimal File 1965-66, Department of State, Central Files, (no number), Telegram from U.S. Embassy, Ottawa to Secretary of State, Jan. 21, 1966.

International Joint Commission with the International Boundary Commission.

In 1952 brief consideration was given to the possibility of amending the appropriation provisions to permit reimbursement by the Commission of agencies providing commissioners for service with the International Joint Commission. This came about as a request for such reimbursement by the Federal Power Commission.[204] Nothing appears to have resulted from the consideration of the request.

In the same year, Truman determined to replace the entire membership of the United States section. Despite advice from the State Department that as important as it was to strengthen the section, Stanley possessed too much political influence to risk his removal, Truman requested resignations.[205] Stanley refused outright to submit his, one ground being that the State Department had no jurisdiction over the Commission.[206] The Canadian commissioners felt that one of the present commissioners should remain for the sake of continuity.[207] One also suggested that if a reorganization were undertaken it would be hoped that the new appointees would be full-time commissioners and not part-time.

> There may have been some justification for such a policy in the early days when the Commission had very little work. Certainly there is no justification for it now. Anyway, the principle is wrong. The work of such an international body as ours is too important to have its members exposed to a divided loyalty.[208]

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204. Decimal File 1950-54, Department of State, Central Files, 611.42311/11-1852, Letter from T.C. Buchanan, F.P.C. Chairman to Dean Acheson, Nov. 18,1952; 611.42311/11-2452, Memorandum from Vallance to Acheson, Nov. 24, 1952.

205. Decimal File 1950-54, Department of State, Central Files, 611-42311/2-1552, Memorandum for File re International Joint Commission, Feb. 15, 1952.

206. I.J.C., Can. Sect. File E-16, Letter from Stanley to Dansereau, Dec. 30, 1952.

207. I.J.C., Can. Sect. File E-16, Letter from Ellis to Sutherland, Dec. 17, 1952; Letter from Dansereau to Stanley, Dec. 27, 1952.

208. I.J.C., Can. Sect. File E-16, Letter from Spence to Sutherland, Jan. 2, 1953.

This view was shared by the Department of External Affairs which took the opportunity to raise with the new administration in the United States the question of appointing federal servants to the Commission.[209]

Following a frustrated and rather humourous attempt in April 1953 by the new President to remove the United States chairman,[210] the President requested a memorandum on his powers to compel the resignations of commissioners including the chairman. This was in response to a memorandum from Stanley to the President in which Stanley held the view that the appointment of chairman was for life, without power of removal. In the view of the legal adviser to the Department, the President possessed absolute discretion and power in the appointment and removal of the commissioners. Even if the commissioners functioned in a judicial or quasi-judicial manner (which the Department maintained they did not), the President could remove the present chairman simply by revoking the Executive order which continued Presidential appointments beyond the age of 70 years.[211]

The suggestion from the White House at this point was that consideration be given to a merger of the International Joint Commission and the International Boundary Commission, presumably as the means of retiring Stanley and obtaining as chairman the man Eisenhower had originally intended to have the job as Commission chairman.[212]. Reaction in the Department was to do nothing until

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209. Canada, Department of External Affairs, File 2492-B-40, Memorandum from Burbridge to Leger, (confidential) May 19, 1953; Despatch from Acting Under Secretary to Canadian Embassy, Washington (confidential), May 25, 1953; Despatch from Canadian Embassy, Washington to Under Secretary (confidential) June 4, 1953.

210. I.J.C., Can. Sect. File E-16, Toronto Globe and Mail, May 2, 1953; Toronto Globe and Mail, Apr. 15, 1953; Ottawa Journal, Apr. 15, 1953; Ottawa Citizen, Apr. 15, 1953.

211. Decimal File 1950-54, Department of State, Central Files, 611.42311/6-853, Memorandum from J. Tate to H. Phleger, Legal Adviser, June 8, 1953.

212. Decimal File 1950-54, Department of State, Central Files 611.42311/6-2353, Memorandum for the Record re Proposal for merger of IJC and IBC (confidential), June 23, 1953.

the Canadian attitude to such a proposal had been ascertained. This was shortly forthcoming through the United States Ambassador. Canadians would be disappointed with such a move, taking it as a "further indication of the United States' indifference to a matter considered important by Canada." Ambassador Stuart felt that the best step was to appoint a United States chairman equal to dealing with General McNaughton. "I am convinced that a man of very real ability should be appointed..."[213]

At the same time the Secretary of the Interior was urging the President to take prompt action in reorganizing the United States section in view of the vital water problems arising along the boundary.

> The United States section of the Commission needs an aggressive full-time Chairman who will organize his office along modern lines and work well within modern government policies and procedures. He should be a man who has achieved some public recognition, preferably a lawyer or public official who can be a diplomat, run a meeting, organize and lead the work of subsidiary boards and committees. He should maintain good relations with Canada, his colleagues, and all agencies who cooperate in doing work with the Commission. He should also, if possible, be from a state on or near the Canadian border and since the other members are from the East, it would seem preferable that the Chairman be from some place west of Chicago.

He further proposed that his Department rather than the Federal Power Commission be represented on the Commission.[214]

The advice of the Department on both this proposal and the one for merging the two Commissions was that nothing should be done until Stanley had been replaced by someone equal to the Canadian chairman and had had time to learn the job.[215]

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213. Decimal File 1950-54, Department of State, Central Files, 611.42311/7-2753, Despatch from Under Secretary Lourie to Stuart, (confidential), July 18, 1953; Despatch from Stuart to Lourie, (confidential), July 27, 1953.

214. Decimal File 1950-54, Department of State, Central Files, 611.42311/7-2453, Memorandum from Under Secretary of Interior to Secretary D. McKay, July 16, 1953; Letter from McKay to Eisenhower, July 22, 1953.

215. Decimal File 1950-54, Department of State, Central Files 611.42311/7-2453, Memorandum from Bonbright, European Division to Lourie, July 31, 1953; Memorandum from Lourie to Sherman Adams, Aug. 19, 1953.

Finally in January 1954 Stanley submitted his resignation effective February 1. The White House immediately renewed its proposal for merging the two Commissions to take advantage of the lawyer who had been appointed in error to the Boundary Commission. It was again rejected by the State Department because of the very different functions of the two bodies and of the attitude of the Canadians.

> I have reviewed this problem and find that the Department believes that any merger of these two commissions should have such unfortunate consequences as to outweigh the relatively small economy which could be achieved.
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> . . .
>
> . . . The Canadians attach very great importance to the International Joint Commission and have appointed very distinguished people to serve on the Canadian side.[216]

The same answer was given again in 1958 when Sherman Adams once more sought to have the proposal reconsidered.[217]

In June the White House announced the appointment of the retiring Republican Governor of Idaho, Len Jordan, as the new chairman of the United States section. Due to his incumbency, he did not assume the position until January of 1955.[218]

The same year the White House requested information from the Department of State concerning whether the Commission was "coping with its tasks" and if not, what steps should be taken to strengthen the United States section. The Legal Office, comparing the two sections, concluded that the United States section was at a distinct disadvantage in most respects. Noting that the reorganization in 1939 had been merely "as an economy measure", Vallance recommended that the section be restored to

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216. Decimal File 1950-54, Department of State, Central Files, 611.42311/1-1954, Memorandum from Vallance to H. Phleger, Jan. 19, 1954; 611.42311/3-2654, Memorandum from Thruston Morton to Sherman Adams (confidential) Mar. 26, 1954.

217. Decimal File 1955-59, Department of State, Central Files, 611.42311/4-2358, Memorandum from Herter to Adams, Apr. 23, 1958.

218. Canada, Department of External Affairs, File 2492-B-40, Despatch from Canadian Embassy, Washington to Department of External Affairs, July 8, 1954; White House Press Release, June 17, 1954.

three full-time commissioners with salaries set at the same levels as the Canadian commissioners.[219] This view was supported in Congress by a Representative from New York who felt that the increasing workload of the Commission made the change imperative.[220] It was underlined by the action of the Federal Power Commission failing to make provision for the salary of R. McWhorter in the 1956 budget on grounds that he was now working full-time for the International Joint Commission.[221] Although the White House inquired as to its authority to fix the salaries of the commissioners, nothing further seemed to come as a result of these pressures.[222]

In face of the diplomatic negotiations and policy statements in which the United States' and Canadian chairmen engaged during the Columbia River investigations, Senator Neuberger of Oregon sought in 1956 and subsequent years to have the American commissioners confirmed by the Senate in their appointment by the President.[223] The Department indicated on each occasion that it would find no objection to such procedure even though it was not provided for in the treaty. Indeed, the Assistant Secretary in 1960 felt that it was quite desirable to have this done since the International Joint Commission, unlike the Boundary Commission, was concerned with "matters of very substantial policy implication and of most important interest to the boundary states. . . . Further, the International Joint Commission has . . .

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219. Decimal File 1950-54, Department of State, Central Files, 611.42311/7-1554, Memorandum from Vallance to Thruston Morton, July 15, 1954.

220. Congressional Record, 84th Congress, 1st Session, 1955, vol. 101, part 4, p. 4480.

221. Decimal File 1950-54, Department of State, Central Files, 611.42311/1-2055, Memorandum of Conversation between Vallance and McWhorter, Jan. 20, 1955.

222. Decimal File 1950-54, Department of State, Central Files, 611.42311/12-355, Memorandum from White House to H. Phleger Dec. 3, 1955; Memorandum from Phleger to White House, Dec. 8,1955.

223. Congressional Record, 84th Congress, 2d Session, 1956, vol. 102, part 5, pp. 7053-7054; 85th Congress, 1st Session, 1957, vol. 103, part 9, pp. 12270-12274; 85th Congress, 2d Session, 1958, vol. 104, part 12, p. 15526; 86th Congress, 1st Session, 1959, vol. 105, part 13, p. 16865.

a quasi-judicial function of substantial importance."[224] This matter has never been further acted upon.

On August 15, 1957 Jordan resigned as United States chairman and the same day Douglas McKay of Oregon, former Secretary of the Interior in Eisenhower's cabinet was appointed to replace him.[225] He was elected chairman in September. The following year McWhorter retired from the FPC and Francis Adams of the same agency was named to succeed him.[226] In July 1959, McKay died suddenly and his vacancy was not filled until June of 1960 when Edward A. Bacon, a successful businessman and Republican supporter from Wisconsin was appointed and elected chairman. Just prior to his appointment the White House posed several questions to the State Department concerning the effectiveness of the Commission in dealing with boundary waters problems. Queried as to the need for revising the 1909 Treaty, the Department was reluctant to consider such a step at the moment.

> Although the Treaty may have certain imperfections, it is considered to have worked well for over half a century and to have contributed in large measure to the avoidance of disputes and maintenance of good relations with Canada. The Department of State feels that it might be desirable at an appropriate future time for the United States and Canada to examine this historic document with a view to determining if it could be improved to the mutual advantage of the two countries. At the present time, however, such discussions, which would open up every boundary water problem and, in particular, the Chicago diversion, could well result in undermining the progress which has been made on the Columbia.

As for the need to strengthen the United States section, the Department felt no "pressing need to initiate such studies." In

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224. Decimal File 1955-59, Department of State, Central Files, 611.42311/7-2357, Letter from Assistant Secretary Macomber to Senator T.F. Green, Dec. 20, 1957; Decimal File 1960-64, Department of State, Central Files, 611.42311/1-1960, Letter from Macomber to P.S. Hughes, Bureau of the Budget, Jan.29,1960.

225. Decimal File 1955-59, Department of State, Central Files, 611.42311/7-257, Memorandum from Dulles to Eisenhower, July 2, 1957.

226. Decimal File 1955-59, Department of State, Central Files, 611.42311/8-558, Memorandum from Herter to Eisenhower, Aug. 5, 1958.

any case it should be postponed until after the appointment of a new chairman of the section. Neither question has been followed up.[227]

With the election in 1960 of the Democratic administration, Bacon was requested to submit his resignation and he was replaced in June 1961 by Teno Roncalio, a banker and Democrat of Wyoming. The following year Adams retired from the FPC and the Commission to be succeeded by Charles Ross, a commissioner of the FPC. In 1964, Roncalio resigned the chairmanship to become a candidate for election to the House of Representatives. This vacancy remained until the appointment in late 1965 of former Democratic Governor of Indiana, Matthew Welsh.[228]

In recent years, there have been few proposals either in Canada or in the United States for change or reorganization of the Commission. Those which have been made have been in very general terms. Some people have suggested that the Commission might in some way become a supranational body with exclusive and comprehensive administrative powers over the Great Lakes system. Others have approached the question of change in terms of expansion of the scope of the Commission's activities to such diverse matters as air traffic, continental energy resources and tariffs.

In a speech before the Canadian Club of Montreal in 1963 the Canadian chairman wondered if the underlying principles and procedures of the Commission could perhaps usefully be extended beyond problems along the boundary line.[229] This thought was picked up by a Canadian student of Canada-United States relations who felt that the Commission could be developed as the nucleus

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227. Decimal File 1955-59, Department of State, Central Files, 611.4232/10-2859, Letter from Assistant Seeretary F. Kirlin to M.H. Stans, Director, Bureau of the Budget, Oct. 28, 1959.

228. White House Press Release, Dec. 18, 1965.

229. A.D.P. Heeney, "Dealing with Uncle Sam--The Work of the International Joint Commission", Address to the Canadian Club of Montreal, Jan. 14, 1963. See also: Heeney: "Diplomacy with a Difference--The International Joint Commission", INCO Magazine, Vol. 31, Number 3, Fall 1966.

of a permanent cooperative structure for dealing with the whole range of uniquely North American affairs.[230]

The authors of the recent report on Canada-United States relations ordered by the President and the Prime Minister offered the following recommendation to the two governments regarding the role of the Commission.

> . . . In our judgment, its solid foundation of law and precedent and its long and successful record in the disposition of problems along the boundary justify consideration of some extension of the Commission's functions. Accordingly, we recommend that the two governments examine jointly the wisdom and feasibility of such a development.[231]

More recently suggestions were advanced by a study-group of Republican Representatives and Senators for an increased role for the Commission. As well as proposing that the Commission be given the task of examining and making recommendations on the continental water and other energy resources, the group urged that the Commission should include facilities for the joint study of the technical aspects of foreign policy issues between the two countries, thus developing expertise in fields other than water.[232]

There has been no indication from either the Canadian Government or the United States Government as to their plans, if any, for the future role of the International Joint Commission.

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230. Tim Creery, "Canada in North American Affairs", Speech before the Canadian Club of Ottawa, Apr. 23, 1963; Creery, "Energy Resources: The North American Political Context", 5th Seminar on Canadian-American Relations, University of Windsor, Nov. 7-9, 1963.

231. Heeney, A.D.P. and Merchant, L.T. Principles for Partnership--Canada and the United States, Ottawa, Queen's Printer, 1965; Washington, U.S.G.P.O., 1965.

232. I.J.C., Can. Sect. File S11-1, Report on United States-Canadian Relations (Tupper Report), Sept. 27, 1965.

VI MISCELLANEOUS DOCUMENTATION

There follows a brief digest of items of documentation relating to the International Joint Commission which were not fitted either in whole or in part into the earlier chapters. These materials relate to the Commission either directly or indirectly and are grouped below chronologically into four categories: published treatises; unpublished theses and manuscripts; hearings and speeches; papers and periodical articles.

A. Published Treatises

The International Joint Commission--Organization, Jurisdiction and Operation under the Treaty of January 11, 1909, between the United States and Great Britain. Washington, U.S.G.P.O., 1924.

Contains a comprehensive treatment of the genesis and early development of the Commission, describing the function as a combination judicial, arbitral and investigatory. Discusses briefly the significance of each clause of the Treaty and concludes with a summary of the first eighteen dockets of the Commission.

Hughes, Charles Evans The Pathway to Peace: Addresses 1921-1925 New York, Harper, 1925.

pp.3-19. The Pathway to Peace, Address to the Canadian Bar Ass'n. Montreal, Sept. 4, 1923.

Dealing with various modes of effecting peaceful settlement, he points to the Commission and joint commissions generally as one important means to achieve settlement: "not to decide but to inform, not to arbitrate but to investigate, to find the facts and to report to the governments of the states . . . "

Hughes suggested unofficially the establishment of a permanent joint commission of wider scope than the Commission composed equally of distinguished Canadian and United States commissioners "to which automatically there would be referred, for

examination and report as to the facts, questions arising as to the bearing of action by either government upon the interests of the other to the end that each reasonably protecting its own interests would be so advised that it would avoid action inflicting unnecessary injury upon its neighbour."

Smith, Herbert Arthur The Economic Uses of International Rivers London, King and Sons, 1931. pp.123-131

Deals with the Commission only by way of example as the most functional of international commissions concerned with economic uses of international waters. Suggests that the Commission's major attribute is the ability to deal with each problem on its own merits in a just manner and not by arbitrary legal rules thus achieving in each case the maximum benefit from the waters. Notes that while the Commission's jurisdiction is relatively limited, "[i]t has proved that all the complex problems arising out of the economic uses of rivers are capable of peaceful and just solution, provided that they are approached in the right way."

Chacko, C. Joseph The International Joint Commission between the United States of America and the Dominion of Canada New York, Columbia University Press, 1932.

The first and only major work dealing exclusively with the Commission, this treatise canvasses the genesis of the Commission, its nature compared to other international water commissions and the functions of the Commission with reference to the various cases which had come before the Commission either by application or reference at this point in time.

Functions, Powers and Duties of the International Joint Commission and of the International Boards Operating under its Jurisdiction Ottawa, King's Printer, 1935.

Outlines briefly the work and accomplishments of the Commission and the role of the various boards created for the

Commission: "The effective machinery in the field to ensure the observance of the international obligations which are embodied in the Commission's Orders." and concludes:

> There is no record of any international controversy or even of local irritation having developed as a result of the action of the Commission in any of these matters. On the other hand, it needs no great imagination to conceive of the number and character of the international controversy which readily might have developed had an attempt been made to proceed with certain of the projects without considering, in the careful manner which has been possible through the machinery provided by the International Joint Commission, interests adversely affected.

Callahan, James Morton American Foreign Policy in Canadian Relations New York, Macmillan & Co., 1937. pp.493-539

In chapter 20 the political aspects of the negotiations leading up to and throughout the treaty are dealt with, particular emphasis being laid upon the developing international personality of Canada.

> . . . One of its practical and significant meanings was the British transfer to Canada of the responsibility of conducting its own foreign relations within the scope of jurisdiction defined in the agreement. It promptly stimulated the creation of a Canadian Department of External Affairs. . .

Corbett, Percy E. The Settlement of Canadian-American Disputes, New Haven, Yale University Press, 1937. pp.50-59; 116-119

Deals with the Commission specifically in relation to its work with inland waterways and generally in relation to the exercise of its powers under Articles IX and X. Believes that its work under Article IX has ensured it a permanent place in the diplomatic machinery of the two countries but doubts that its powers under Article X will ever be used because the personnel of the Commission is not competent to deal with arbitral matters.

Jessup, Philip C. Elihu Root vol. 2, 1905-1937 New York, Dodd, Mead & Co., 1937. pp. 96-99

Sets out briefly the rôles played by Gibbons and Anderson in negotiating the Boundary Waters Treaty.

> On the American side, the real negotiator, the man who worked out every point of detail, was Chandler P. Anderson. His service was not as a mere assistant, but a strong co-adjuter of independent contacts with the representatives of other powers.

Osborn, C.S. & Osborn, S.T. The Conquest of a Continent Lancaster, Pa., Science Press Printing Co., 1939. pp.85-111

Gives a comprehensive account of the IJC and its work based mainly upon Burpee's "Insurance for Peace" and Kyte's 1935 radio broadcast.

Concludes:

> It would be difficult to exaggerate the importance and significance of this action on the part of two neighbouring nations, in creating an international body, on which they have equal representation, and transferring to it a material part of their own sovereignty. Such a remarkable departure from the traditions of the past is, of course, only practicable in the case of two countries feeling for each other such mutual confidence and respect as exists between Canada and the United States. The International Joint Commission is an unusual, interesting and daring experiment--an attempt to demonstrate in practice certain theories as to the relationship that should exist between two neighbouring peoples . . . .

Simsarian, James The Diversion of International Waters Washington, (private printing), 1939. (see lengthy extract: "The Diversion of Waters Affecting the United States and Canada", 32 A.J.I.L. 488 (1938).)

Deals chiefly with the legal aspects of the negotiations surrounding Articles II, V & VI, pointing out the particular problems surrounding the drafting of Article II.

Hackworth, Green Haywood Digest of International Law Washington, U.S.G.P.O., 1940. Vol. 1, pp.616-618; 755-758

Volume I sets out the major provisions of the Boundary Waters Treaty and comments on the Canadian views on the right of diversion within a country's own territory. It also deals with the more important features of the Commission in comparison to those of the earlier International Waterway Commission.

Masters, Ruth D. Handbook of International Organizations in the Americas Washington, Carnegie Endowment for International Peace, 1945. pp.225-234

Outlines summarily the history, functions (administrative, investigative and arbitral), membership, administration and work done by the International Joint Commission. Deals only with major matters that have come before the body.

Brebner, John B. North Atlantic Triangle Toronto, Ryerson Press, 1945. pp.265-267

Mere brief description of the Treaty and Commission as one of the most significant original developments in direct relations between Canada and the United States.

Brown, George W. The Growth of Peaceful Settlement Between Canada and the United States (C.I.I.A. Contemporary Affairs) Toronto, Ryerson Press, 1948. pp.26-31

Notes that the Treaty had as its basis the increasing uses of waters and the inability of the IWC to enforce its decisions even in its narrow geographic scope and concludes that the Commission is "the most important single agency for peaceful settlement so far established between Canada and the United States."

Glazebrook, G.P. de T. A History of Canadian External Relations Toronto, Oxford University Press, 1950. pp. 238-241; 365

Deals with the Commission as one (and the first) piece of diplomatic machinery between Canada and the United States and

suggests the limited rôle of the Commission is evidenced by the fact that the subsequent establishment of the diplomatic missions did not destroy the functions of the Commission.

Keenleyside, H.L. & Brown, G.S. Canada and the United States: Some Aspects of their Historical Relations New York, Knopf, 1952. pp. 396-399

Briefly describes the functions of the Commission suggesting it is one of the major factors contributing to the peaceful relations between the two countries.

> The International Joint Commission is still a successful operating agency, effective in action and unique in constitution. Its significance was strongly underlined by the enlarged application of the principle on which it was based by the creation during the war of a whole series of agencies in its image. It is still one of the most important, most satisfactory, and most thoroughly unique developments in the history of international relations.

Bloomfield, L.M. & Fitzgerald, G.F. Boundary Waters Problems of Canada and the United States Toronto, Carswell Co., 1958.

In several short chapters, it outlines the nature of the Treaty and the Commission, the work of the Commission as a judicial, investigative, administrative and arbitral body and the organization and procedure of the Commission. This is followed by a comprehensive summary of each docket of the Commission from 1912 to 1958 with particular attention to the legal issues that arose in several of the cases.

Barber, Joseph Good Fences Make Good Neighbors: Why the United States Provokes Canadians New York, McClelland and Stewart, 1958. c.10

Deals with the Commission only in terms of the Columbia River negotiations and pointing to the impasse which occurred between the sections and the subsequent removal of the matter from the jurisdiction of the Commission, Barber wonders if this might lead to a permanent abandonment of the "relatively informal, judicial deliberations of the long established Joint Commission"

in favour of the traditional bargaining procedures in which Canada usually came out on "the short end of the stick."

Berber, F.J. Rivers in International Law London, Stevens & Sons, 1959. pp.111-115

Deals not with the Commission but only with the Harmon Doctrine and the dispute between Canada and the United States over the interpretation of Article II of the Treaty.

Deener, David R. (ed.) Canada-United States Treaty Relations Durham, N.C., Duke University Press, 1963. pp.28-71

La Forest in dealing with boundary water problems in the East describes the Treaty and the Commission, emphasizing the broad scope of the former and its flexible interpretation by the commissioners. The value of the Commission is illustrated by the detailing of two major developments in the East and in the analysis by Charles Martin of the Columbia River Treaty in the West where the investigative and recommendatory roles of the Commission are emphasized.

Whiteman, Marjorie M. Digest of International Law Washington, U.S.G.P.O., 1964. Vol. 3, pp. 752-871

In addition to extracts from the Treaty and Rules of Procedure, the work contains a complete digest of all dockets of the Commission, 1-80.

Castel, J.G. International Law Chiefly as Interpreted and Applied in Canada Toronto, University of Toronto Press, 1965. pp.379-385

Basically the description of the Commission and its work set out in 3 External Affairs 90-95 (1951).

B. Unpublished Theses and Manuscripts

Brown, Mannie An Introduction to the Legal Aspects of the St. Lawrence Waterway Project M.A. in Law, University of Toronto, 1935. pp.17-25; 99-119

First describes the role of the Commission in studying the St. Lawrence project under the 1919 reference and then deals generally with the treaty and the Commission, setting out the various matters which had come before the body.

Sinclair, Elizabeth B. The International Joint Commission: An Historical Survey and Analysis with Emphasis upon Early Work M.A., Columbia University, 1930.

A sketchy and uncritical survey of the early work of the Commission with some emphasis on six of the early cases before the Commission. Does make the point that while everyone calls for increased publicity for the Commission, it is perhaps better working quietly without the glare of public attention.

Blais, Rolland Canadian and American Boundary and Transboundary Rivers: Their Status in Municipal and International Law Seminar Paper, McGill Law School, 1957.

Only the final part of the paper deals with the Boundary Waters Treaty and this in a largely uninformed fashion.

Dunlop, Charles Clifford The Origin and Development of the International Joint Commission as a Judicial Tribunal M.A., Queen's University, 1959.

A well-researched and intelligent consideration of the Commission as a judicial body. Considering in detail the Commission under the following headings: "Personnel and Finance", "Procedure of the Commission", and "The Commission and the Law", Dunlop concludes that while the Commission originated as a judicial body, its functions have changed over the years to some extent although much of its work even today is of a judicial nature.

Piper, Donald Courtney The International Law of the Great Lakes Ph.D., Duke University, 1961. University Microfilms Inc., Ann Arbor, 1963.

Touches only briefly on the Commission but makes extensive reference to the water law principles of the treaty as they have relevance to the Great Lakes. Also deals with matters relating to the Great Lakes which have come before the Commission.

Jones, D. Wendy The Negotiations of the Boundary Waters Treaty of 1909 B.A. Hons. Essay, Carleton University, 1962.

Purpose of the paper is to examine and assess the development of Canada's international personality in the treaty negotiation. Rather sketchily outlines the drafting, ratification and implementation of the Boundary Waters Treaty.

Scott, Robert Day The Harmon Doctrine: Origin and Application 1880-1923 Washington, Unpublished Manuscript.

A large part of the paper deals with the negotiations between Anderson and Gibbons over the formulation of Article II in the treaty. Sets out in considerable detail the arguments over its meaning in the House of Commons in 1910.

Jordan, F.J.E. The Changing Role of the International Joint Commission (Canada-United States) LL.M., Michigan Law School, 1964.

After extensive examination of the genesis of the Commission the work seeks to explain the present role of the Commission through an examination of the references dealt with by the Commission.

C. Speeches, Papers and Periodical Articles

George C. Gibbons, "Work of the Waterways Commission", Proceedings, Canadian Club of Toronto, vol. 6, 1908-09, pp. 102-107

Outlines the principles of international water use which have been enunciated by the International Waterways Commission and suggests the need for a body which can apply these principles.

Stresses the necessity for direct relations with the United States on all matters of North American concern.

Statement re: Boundary Waters Treaty, March 10, 1913. Magrath Papers, vol. 6, file 23.

Provides a comprehensive analysis of the major features of the treaty as interpreted by Magrath and summarizes the issues then before the Commission.

Sir George Gibbons, "International Relations", Address to the Canadian Bar Association, Toronto, 1916. Papers Relating to the Work of the International Joint Commission, pp.7-17

An attempt to explain the importance of the provisions of Article II and in particular the concept of equal division of the waters along the boundary. In relation to Article II he pointed out that it provided a remedy of equal treatment unknown in law before.

> Before adoption of this treaty there was no rule of international law which called upon any of the nations to recognize riparian rights outside of its own territory. Every nation had a perfect right, as long as it did not interfere with the rights of navigation, to divert the waters of the boundary streams without regard to the injury inflicted upon private interests beyond the boundary line.

Manton M. Wyvell, "Peace between Canada and the United States", Advocate of Peace, July 1921, pp. 254-257. IJC, Can. Sect. File E-8-10.

A poorly written general account of the role and nature of the Commission.

Sir Robert Borden, "Political Development and Relations Among the English-Speaking Peoples", Speech at the University of Michigan, Oct. 6, 1922. I.J.C., Can. Sect. File E-8-10.

Notes the importance of the International Joint Commission in United States-Canadian relations and suggests that it has become a permanent institution which can handle any dispute that might arise.

L. J. Burpee, "An International Experiment", Address to the School of Law, University of Michigan, 1922. Papers Relating to the Work of the International Joint Commission, pp.48-62. (Found also in Dalhousie Review, 1923.)

Outlines the history of the negotiations and the establishment of the Commission and seeks to explain its nature in terms of the work it has done since 1912. Concludes with a strong plea for recognition of the value of the Commission by placing more confidence in its competence.

> . . . There is no getting away from the fact that the Treaty of 1909 and the International Joint Commission will not and cannot realize the tremendous possibilities of good that lie within them, until the people of these two neighbouring democracies determine to give them their intelligent and wholehearted support.

Hon. Wesley L. Jones, "The International Joint Commission of the United States and Canada", Speech in the United States Senate, Feb. 26, 1915. Papers Relating to the Work of the International Joint Commission, pp. 18-26

A rather general but vigorous defence of the Commission, elaborating on the cases which had been "settled" by it and concluding that

> . . .[t]his Commission therefore has not only justified its existence and the wisdom of the high contracting parties in creating it, from the standpoint of material benefit to the Governments and the people living along these boundary waters, but its work and the satisfaction which the result of its labor has given to both governments and their people is a splended tribute to the genius and progressive international statesmanship of the two great English-speaking nations of the world in thus providing a means which, as the result of actual experience, is proving efficient and invaluable for the judicial settlement of great international questions involving treaty obligations or the rights and interests, as well as the health, of their respective peoples.

L.J. Burpee, "A Successful Experiment in International Relations", Address to the Victorian Club of Boston, Feb. 17, 1919. Papers Relating to the Work of the International Joint Commission, pp.27-42

Traces the background to the negotiations which resulted in the treaty and the Commission. Then examines each of the

Articles, suggesting interpretations of them. Next turns to an elaboration of the various cases that have come before the Commission, explaining how the body deals with the questions, emphasizing the uniqueness of the approach and its essential value.

> One need not labour the point that this Tribunal, open as freely to the humblest citizen of either country as to the representatives of the Federal Governments, marks a big step forward in the relations of these two neighbouring commonwealths; and it does seem to me that the true measure of the Commission's usefulness to the people of the United States and Canada lies not even so much in its positive as in its negative qualities, not so much in the cases it has actually settled as in the infinitely larger number of cases that never come before it for consideration, simply because the Commission is there, as a sort of international safety-valve, and therefore the sting is taken out of the situation.

Charles S. MacInnes, "The International Joint Commission", Papers Relating to the Work of the International Joint Commission, pp.43-47. (see also Round Table, September, 1915.)

A brief but cogent account of the establishment of the Commission and of its import in relations between the two countries since it deals with such a vital matter as water.

L.J. Burpee, "Insurance for Peace", Papers Relating to the Work of the International Joint Commission, pp. 63-70 (see too, Kiwanis Magazine, September, 1925.)

A brief account of certain of the matters dealt with by the Commission designed to reflect the unique nature of the body--particularly the fact that there is no umpire and the fact that the Commission goes to the localities involved. The article also quotes extensively from a contemporary article in the Christian Science Monitor which criticizes the failure to publicize the work and success of the Commission.

L.J. Burpee, "A North American Forum", Address at the Round Table Discussions, Kyoto, 1929. Magrath Papers, vol. 5, file 19.

A general survey of the Commission and its work with particular emphasis on characterizing its functions; judicial, investigative, and arbitral, but most of the work to date has been judicial. Places particular emphasis on the favourable comments made about the Commission by King, Borden, Lord Curzon, Charles Evans Hughes.

"Arsenals versus Courts" 59 New Republic, pp. 220-222, July 17, 1929.

Suggests that the reason why Canada and the United States seldom have major disputes is that they have always provided the machinery necessary to settle the problems before they become disputes. Points to the IJC as the best case in point and notes that its permanency has made it even more effective.

> . . . the International Joint Commission has prevented many disputes from arising between United States and Canada, and in so doing has contributed perhaps more to the peaceful relations of these two countries than the unfortified frontier. Indeed, it might not be unfair to say that this frontier is a symbol of the Commission's labors.

Also proposes that the Commission might well take on other matters of difference between the two countries such as tariffs, etc., and be enlarged if necessary to replace diplomatic negotiations on many matters.

R.A. MacKay, "The International Joint Commission between the United States and Canada", Papers Relating to the Work of the International Joint Commission, pp. 71-100. (see also 22 A.J.I.L. 292 (1928).)

The first scholarly attempt to analyse the operation of the Commission, it considers the quasi-judicial powers, the executive powers, the investigative powers and the arbitral

powers of the Commission in terms of the cases which had been dealt with by the body. After looking too at the organization and procedure of the Commission, it concludes that the Commission was a success due mainly to three reasons: it was a permanent body with an esprit de corps, the independence and impartiality of the commissioners and to the simplicity and directness of the procedure.

"The International Joint Commission", 20 Round Table, pp. 381-393, 1929-30.

Suggests that the treaty fills the obvious gaps in international water law and establishes a body to apply the rules which it lays down in an area in which the governments could not deal directly due to the increasing competition for the uses of boundary waters.

Considers the Commission's success to be based upon the permanency of the Commission, the knowledge of the commissioners, the independence of the members, the directness and simplicity of the procedure and the cooperation of the two Governments.

Describes the Commission as an example of "international government over nationals and national territory" and more important, a move by the two countries toward eventual cooperative development of international water resources.

Wm. H. Smith, "The International Joint Commission", Papers Relating to the Work of the International Joint Commission, pp. 110-115

Outlines in considerable detail the background and nature of the Commission so as to gain for it an appreciation by the public. Deals with each of the Articles, explaining their ramifications and, with reference to the international character of the Commission suggests:

> . . . [w]hile the Commission is composed of an American and a Canadian section, each with a Chairman and a secretary, neither side has any authority under the Treaty to act in either country independently of the other. Each section acts in conjunction with the other as a joint international organization which functions as a unit.

J.A.P. Haydon, "Cooperation, Not Force", 13 Trades and Labor Congress Journal (no. 8), pp. 22-23, Aug. 1934.

Gives brief sketch of the International Joint Commission as a device for harmonizing relations between neighbouring nations.

L.J. Burpee, "Quotations by Various Statesmen relating to the International Joint Commission", 1936 IJC, Can. Sect. File E-8-10.

R.B. Bennett: "The International Joint Commission -- a successful experiment of what the will of goodwill and neighbourliness may accomplish in International affairs."
C.A. Magrath: "My twenty-four years association with the work of the International Joint Commission, and which ends today, leads me to say, that no effort is more important, and few indeed quite as fine, as serving two neighbouring peoples in disposing of differences that may from time to time arise between them."
Arthur Meighen: "The International Joint Commission has indicated the faith of statesmen who conceived and established it. The powers of this Commission should be extended and in the extended area its decision should be final unless reversed by a preponderant majority of the statesmen of either country."
R.L. Borden: "The International Joint Commission gives service not only to two great neighbouring nations but to the world in exemplifying good will and friendly endeavours for the cause of public right and peace on earth."
Lord Tweedsmuir, G.G.: "The International Joint Commission has, since its inception, shown the world the example of true machinery of peace which settles disputes before they arise, and thereby perpetuates the unwritten alliance of friendship between two great countries."

Elihu Root: "For the International Joint Commission whose work is a signal illustration of the true way to preserve peace--by disposing of controversies at the beginning before they have ceased to be personal and nations have become excited and resentful about them."

Lord Bryce: "The creation of the International Joint Commission was one of the best things done in our time for peace and good will between the British Empire and the United States."

F.D. Roosevelt: "The establishment of the International Joint Commission was unquestionably one of the most notable steps taken by the United States and Canada in their continuous efforts towards eliminating causes of possible friction between the two countries."

Cordell Hull: "The International Joint Commission has made real contributions to the amicable relations between the United States and Canada by providing a forum for the speedy examination and settlement of disputes."

Mackenzie King: "The creation of the International Joint Commission was an act of faith in human intelligence and good will on the part of the peoples of Canada and the United States. It has become a very silent witness to this wisdom of their decision--over a century old--not to arm against each other, and to the power of non-violence. To our two countries it is the guardian of the most precious heritage we hold in common."

L.J. Burpee, "Peacemakers in America--The Work of the International Joint Commission", 25 The School (no. 6), Feb. 1937 (see also, IJC, Can. Sect. File E-8-10; Magrath Papers, vol. 6, file 25.)

Outlines briefly the background to the Commission and the nature of the jurisdictions conferred on it by the Treaty. Notes the use of Boards of Control. Concludes:

> It would be difficult to exaggerate the importance and significance of this action on the part of two neighbouring nations, in creating an international body, on which they have equal representation, and transferring to it a material part of their own sovereignty. Such a remarkable

> departure from the traditions of the past is, of course, only practical in the case of two countries feeling for each other such mutual confidence and respect as exist between Canada and the United States. The International Joint Commission is an experiment, a very unusual, interesting and daring experiment: an attempt to demonstrate in practice certain theories as to the relationship which should exist between two neighbouring peoples; an attempt to extend to the citizens of two nations, without impairing the independence of either, the same spirit of good fellowship and fair dealing that binds together men of common allegiance.
>
> . . . .
>
> In the last analysis the success of this Commission, as a means of settling disputes and also of preventing them--and perhaps the latter is the more important service--must depend to a very large extent upon public understanding and support in the two countries. The people of Canada and the United States cannot be expected to give their whole-hearted support to such a tribunal unless they thoroughly understand why it was created and how it carries on its very important work.

George W. Kyte, "Organization and Work of the International Joint Commission", Ottawa, King's Printer, 1937. Magrath Papers, vol. 6, file 25.

Describes the work of this "International Court" through the use of selected cases. Emphasizes the permanent and all-encompassing nature of the Commission and suggests that it is one of the most advanced steps taken by any two governments.

L.J. Burpee, "From Sea to Sea", 16-17 Canadian Geographical Journal, pp. 3-32, 1938.

Describes the various references that have come before the Commission noting the important value of Article IX in bringing matters before the IJC, limited as it is to frontier questions.

Foreward to the International Joint Commission Album prepared by C.A. Magrath, May 1938.

Outlining the early history of the Commission, Magrath notes with regard to appointments to the Commission:

> The Canadian members are selected from those who are or have been active supporters of the political party making the appointments, but changes in Government have not in recent years affected their permanency whereas President Taft adopted the principle that the Government of the day will have two of the three members politically sympathetic to it.

L.J. Burpee, "Good Neighbours", Contemporary Affairs No. 4, Toronto, Ryerson Press, 1940.

The major effort by Burpee to provide a comprehensive outline of the Commission and its work. Deals with all cases which had come before the Commission and relates the various functions of the Commission. Suggests that the equal partnership created by the Commission is of far greater importance to Canada than it is to the United States. Notes that the personnel of the Commission has been of high caliber by and large and where disagreements have arisen among the members it has been on the basis of professional opinions rather than along national lines.

L.J. Burpee, Untitled speech, 1940. I.J.C., Can. Sect. File E-16-1.

Relates various anecdotes about the early members of the Commission.

L.J. Burpee, "A Hundred Years of North America", 1942. I.J.C., Can. Sect. File E-8-10.

Explains the Commission as a very important link in Canada-United States relations. "The history of the Commission is in a very real sense the history of the Canada-United States relations as they are today."

Relates some humourous incidents involving the Canadian and United States commissioners.

J.E. Perrault, "Commission conjointe internationale", 4 Revue du Barreau, pp. 1-9, 1944. (see too I.J.C., Can. Sect. File E-8-10)

A short article by the Canadian commissioner outlining the nature, functions and certain of the work of the Commission. He concludes:

> . . . Cette commission internationale a été une expérience audacieuse. Un tel abandon des voies diplomatique traditionnelle n'est pas possible qu'entre deux peuples qui ont en vers l'un l'autre une confiance mutuelle.

Joseph W. LaBine, "Six Men and a Border", Kiwanis Magazine, Sept. 1948, pp. 27-29

Points out two "outstanding" features of the Commission: It is available to the "little man" as well as to the "big" and it operates on the basis of "quiet diplomacy".

> Probably not one American or Canadian in a thousand is aware that an International Joint Commission even exists, yet this almost anonymous six-man institution could qualify easily as one of the world's oldest, most successful and most practical boards of arbitration!

A.O. Stanley, "3000 Miles and Never a Quarrel", 76 The Rotarian June 1950, pp. 20-23 (see too, Congressional Record, 81st Congress, 2d Session, 1950-51, vol. 96, part 15, Appendix 4025-27; 12 Pacific Northwest Industry, Sept. 1953, pp.223-226)

Explains the variety of functions exercised by the Commission, noting the harmonious manner in which the work is done.

Notes how the scope of the studies referred to the Commission has broadened in recent years.

"The International Joint Commission", 3 External Affairs, March 1951, pp. 90-95

A general article describing the establishment, principles, composition, jurisdiction, references and boards of control. Particular emphasis is placed on the increasing use of references.

> . . . The procedure for referring a question to the Commission is designed to insure the minimum amount of delay and the maximum cooperation from both countries.
>
> This treaty, the Boundary Waters Treaty of 1909, so farsighted and wide in its scope, was but the natural outcome of the desire of two friendly neighbours

> possessing a common heritage and striving for the same ideals, to settle in an amicable and informal manner any of the differences and disagreements, which are bound to arise between even the closest friends. The means of implementing this common purpose was the International Joint Commission, the establishment of which was provided for in this treaty.

A.G.L. McNaughton, Address to the Association of Professional Engineers of Ontario, Toronto, Jan. 27, 1951. I.J.C. Can. Sect. File E-10-3.

A comprehensive commentary on the treaty provisions and the functions of the Commission with specific reference to a number of matters dealt with by the Commission.

> The text of the Treaty shows that the plenipotentiaries had a very clear conception of the varied character of the complex questions and mutual problems which were likely to arise in each of these several categories of waters and certainly they have provided the Commission with authority which has proved apt in each one of the particular sets of circumstances which have had to be met.

A.G.L. McNaughton, "The International Joint Commission", Address to the Electric Club of Toronto, Feb. 28, 1951. I.J.C., Can. Sect. File E-10-3.

Outlines in detail the proposals for development of the St. Lawrence Seaway and the role played by the Commission in the studies undertaken.

A.G.L. McNaughton, "Boundary Waters Between Canada and the United States", Address to the Empire Club, Toronto, Dec. 6, 1951. Empire Club Addresses, 1951-52, pp. 121-136

Relates almost exclusively to the efforts over the years to work out a plan of development for the St. Lawrence system.

A.G.L. McNaughton, Address to the Royal Military College, Kingston, Oct 27, 1952. I.J.C., Can. Sect. File E-10-3.

Suggests that the responsibilities of the Commission are very extraordinary and, within clearly defined limits, its authority is above the national law of the two countries. Virtually identical to the Professional Engineers speech.

"The International Joint Commission", Canadian Bank of Commerce Commercial Letter, August 1952. I.J.C., Can. Sect. File E-16.

A general account of the establishment and work of the Commission highlighting a number of the more important references.

A.G.L. McNaughton, "The Water Problem on the Canadian Boundary", Address to the Annual Dinner of the Canadian Manufacturers Association, Toronto, May 28, 1953. 54 Industrial Canada, July 1953, pp. 80-88

Taking as examples the St. John River the St. Lawrence Seaway, the Niagara Falls and the Columbia River references, the General explains how the Commission seeks to harmonize the various and divergent uses to which the waters in each case might be put.

Makes a strong argument for an equitable sharing of the Columbia River waters, describing the efforts to reach an accord on this reference as one of the greatest challenges ever to come to the Commission.

A.G.L. McNaughton, Address to the National Defence College, Kingston, July 27, 1953. I.J.C., Can. Sect. File E-10-3.

Deals chiefly and in detail with the Columbia River reference before the Commission.

A.G.L. McNaughton, Address to the Engineers Council for Professional Development, New York, Oct. 16, 1953. I.J.C., Can. Sect. File E-10-3.

Discusses the nature of the water problems in North America and the role which the Commission must play.

> It must now be recognized that there simply is not enough water for all desired uses, and that in many places already its supply has become the limiting factor on development. And so we face the prospects of envious competition, not only between regions in each of our countries, but likewise across the boundary from one country to the other.

A.G.L. McNaughton, "Water Resource Development in the Pacific Northwest", Address to the Pacific Northwest Trade Association, Spokane, Nov. 2-3, 1953. I.J.C., Can. Sect. File E-10-3.

Similar to the Engineers Council address except that illustration is confined to the Columbia River.

C.K. Hurst, Address to the Kiwanis Club of Peterborough, November 1953. I.J.C., Can. Sect. File E-16.

Outlines the nature and creation of the Commission, and, with reference to several dockets, explains the manner in which the Commission operates.

Alan O. Gibbons, "Sir George Gibbons and the Boundary Waters Treaty of 1909", 34 Canadian Historical Review 124-138 (1953).

Contains the highlights of the correspondence between Gibbons and Laurier from 1906 to 1909 relating to the negotiation of the treaty.

A.G.L. McNaughton, Address to the Royal Roads Military College, Esquimalt, Feb. 19, 1954. I.J.C., Can. Sect. File E-10-3.

Identical to the Engineers Council address.

A.G.L. McNaughton, "Water Problems on the Canada-United States Boundary", Address to the Canadian Club of Montreal, March 8, 1954. I.J.C., Can. Sect. File E-10-3.

Identical to the Engineers Council address.

A.G.L. McNaughton, Address to the National Defence College, Kingston, July 20, 1954. I.J.C., Can. Sect. File E-10-3.

Almost identical to the Engineers Council address.

A.G.L. McNaughton, Address to the Canada-United States Committee of the Canadian Chamber of Commerce and the United States Chamber of Commerce, Ste. Adele-en-haut, Sept. 30-Oct. 1, 1954. I.J.C., Can. Sect. File E-10-3.

A two-part address, the first dealing with the physical attributes of the Columbia River and the second outlining the legal aspects of power sharing under Article II of the Treaty.

C.K. Hurst, "International Waterways Problems--The Boundary Waters Treaty, the Duties of the International Joint Commission and the Function of the Water Resources Division on assignments for the International Joint Commission", Address to the District Engineers of the Water Resources Branch, Feb. 18, 1955. I.J.C. Can. Sect. File F-1-2.

After briefly discussing the articles of the Treaty, Hurst explains the role played by various government departments in assisting the Commission in undertaking an investigation under a reference.

Len Jordan, "Some Technical and Economic Aspects of United States-Canadian Water Resources", Address to the Canada-United States Committee, Bermuda, Mar. 10-12, 1955. I.J.C., Can. Sect. File E-8-2.

Discussing the principle of "equal and similar rights" in the Treaty as applied to boundary waters has no application to transboundary waters and therefore, the Commission must seek to evolve appropriate principles for this new situation.

A.G.L. McNaughton, "The Significance of the Seaway", Address to the University of Michigan, June 23, 1955. I.J.C., Can. Sect. File E-10-3.

Deals with the role of the Commission in the 1920's only.

Len Jordan, Address to the Oregon Farm Bureau Federation, Salem, Nov. 15, 1955. I.J.C., Can. Sect. File E-8-2

Deals mainly with the arguments favouring private power development in the United States. Describes the duties of the United States members of the Commission as "to safeguard

the interests of the United States in our dealings with Canada over boundary waters and rivers which cross the boundary."

A.G.L. McNaughton, "Problems of Development of International Rivers on the Pacific Watershed of Canada and the United States", Address to the Sixth World Power Conference, Vienna, 1956. I.J.C., Can. Sect. File E-10-3.

Deals with the international aspects of the development of the Columbia River under Article II of the Treaty and McNaughton's proposals for a Canadian plan.

Len Jordan, "The Boundary Waters Treaty of 1909", Statement before the Senate Joint Committee on Interior and Insular Affairs and Foreign Relations, Mar. 22, 1956. I.J.C., Can. Sect. File F-1-2.

An explanation of the Treaty and the Commission in terms of the Libby Dam application and the Columbia River reference and comments on the position taken by General McNaughton concerning diversion of the Columbia.

Suggests that the U.S. section views its role as one of preventing disputes rather than discussing legal remedies under Article II and thus he seeks agreement with the Canadian section.

C.K. Hurst, "Water in International Affairs", 16 Behind the Headlines (no. 3), Sept. 1956.

Notes the role which the Commission has played in seeking to resolve the conflicts among the competing demands for the use of international water resources.

Leon J. Ladner, "Diversion of Columbia River Waters", UBC Lecture Series No. 27, 1956, pp. 1-17

Considers the interpretation of Article II in light of the Columbia River dispute and suggests that the Commission work out a cooperative sharing arrangement rather than adhering in each section to intractable interpretations of Article II.

C.B. Bourne, "International Law and the Diversion of the Columbia River in Canada", UBC Lecture Series No. 27, 1956, pp. 17-27

Consideration only of Article II and conclusion that under it Canada has an absolute right to divert the Columbia in B.C.

The Activities of the International Joint Commission 1909-1956, Department of Northern Affairs and National Resources, Water Resources Branch, Queen's Printer, 1956

A summary of all IJC dockets to 1956.

Ernest Watkins, "The Columbia River: A Gordian Knot", 12 International Journal 250-261 (1957).

After discussing the legal rights under Article II and the position if the Treaty were abrogated, Watkins suggests that the problem of the Columbia can be solved only by a political compromise and not by a legal wrangle.

Eugene Weber, "United States-Canadian Water Resource Problems", Address to the Oregon Society of Professional Engineers, Portland, Nov. 7,1958. I.J.C., U.S. Section File "Speeches".

A general outline of the nature and working of the Commission with a survey of matters presently before the Commission.

Robert D. Scott, "The Canadian-American Boundary Waters Treaty: Why Article II?", 36 Canadian Bar Review 311 (1958).

Attempts to set out the background to the negotiations of Article II in 1908.

G.F. Fitzgerald, "Legal Aspects of the Power Development of the St. John River Basin", 12 Univ. of New Brunswick Law Journal 7-38 (1959).

Deals with the work of the Commission in relation to the St. John River Basin.

Eugene Weber, "Activities of the International Joint Commission, United States and Canada", 31 Sewage and Industrial Waste 71-77 (January 1959).

Outlines briefly the background to and the responsibilities of the Commission, dealing specifically with the role of the Commission in relation to abatement of international air and water pollution through a system of cooperative study and action.

Jacob Austin, "Canadian-United States Practice and Theory Respecting the International Law of Rivers: A Study of the History and Influence of the Harmon Doctrine", 37 Canadian Bar Review 393 (1959).

While dealing particularly and at length with the origins and meanings of Article II of the treaty, Austin also considers other of the Articles, concluding:

> Truly, viewing the Boundary Waters Treaty of 1909 under the articles we have examined thus far it is a wonderful document for international cooperation and harmony. To quite an extent, considering the period in question, both countries had given up a significant area of their national sovereignty, not only in theory, but with regard to substantial assets in the economy of each nation. . . .

Statement by John Foster Dulles on the 50th Anniversary of the International Joint Commission, Congressional Record, 86th Cong., 1st Sess., 1959, vol. 105, part 1, p. 799

> This treaty and the Commission which it established have made an important contribution to the maintenance of the excellent relations which we have enjoyed with Canada over the years. It has provided the means of resolving problems connected with boundary waters through mutual cooperation, and it exemplifies the spirit with which we and our Canadian neighbours have approached many other questions of joint concern.
>
> The problems which have come before the International Joint Commission since 1909 have touched the lives and interests of countless citizens on both sides of the border. They have ranged from consideration of relatively minor matters such as the proposal of an individual to block a transboundary stream to decisions controlling the vast power and navigation projects on the St. Lawrence River, but all have received fair and thorough consideration by the Commission with a view to protecting the rights of all concerned.

A.G.L. McNaughton, Address to the Canadian Institute of International Affairs, Montreal, Feb. 16, 1960. I.J.C., Can. Sect. File E-10-3.

In the main an advocacy of his position on Article II that it requires recognition of equitable rights for both parties in the use of international streams. Also notes that the treaty must accommodate new situations and its general principles are flexible for this purpose.

A.G.L. McNaughton, "The Development of the International Section of the St. Lawrence River", Address to the Royal Canadian Institute, Toronto, Mar. 4, 1961. I.J.C., Can. Sect. File E-10-3.

Details the studies, investigations and negotiations relating to the St. Lawrence from 1920 to date, noting particularly the role of the Commission, first in the reference and later in the application.

Teno Roncalio, Opening Remarks at the Columbia River Treaty Panel Discussion, Inland Empire Waterways Association, Spokane, Oct. 23, 1961. I.J.C., U.S. Sect. File Speeches by IJC Personnel.

Brief remarks on the nature and work of the Commission with particular reference to the Columbia.

Teno Roncalio, Address to the Columbia Interstate Compact Commission, Seattle, Feb. 5, 1962. I.J.C., U.S. Section File Speeches by IJC Personnel.

Deals with the Columbia River reference, disagreeing with the position taken by the Canadian chairman.

A.D.P. Heeney, "Dealing with Uncle Sam--The Work of the International Joint Commission", Address to the Canadian Club of Montreal, Jan. 14, 1963. I.J.C., Can. Sect. File E-8-11.

Deals with the Commission as one of the effective methods of carrying on relations with the United States.

> Whether this same principle and similar procedures could usefully be extended beyond problems of the boundary seems to me worthy of consideration--on both sides--and this especially as Canadian-United States mutual involvement, and our "dealings with Uncle Sam" increase daily--in volume, complexity and significance.

G. Graham Waite, "The International Joint Commission--Its Practice and Its Impact on Land Use", 13 Buffalo Law Review 93-118 (1963).

Deals basically with the procedure before the Commission noting that its process of deliberation is more akin to a legislative committee than to a court of law.

Explains that the rules of procedure differ sharply from the actual practice and suggests that most functions of the Commission are carried out by expert boards.

Traces in detail the procedure followed on an application and on a reference.

Tim Creery, "Canada in North American Affairs", Speech to the Canadian Club of Ottawa, Apr. 23, 1963.

Makes a case for expanding the scope of matters dealt with by the Commission to include such things as other energy resources, air line routes, investment, taxation, etc.

Vade-Mecum Prepared by the Canadian Section, International Joint Commission, 1963.

Sets out a summary of each of the 78 dockets of the Commission.

M. W. Thompson, "International Water Problems on the Prairies", Address to the Engineering Institute of Canada, Banff, May 1964. I.J.C., Can. Sect. File E-8-7.

Using as illustrations the various prairie water references, Thompson describes the different roles of the Commission under the treaty.

René Dupuis, Speech to the Montreal Port Council, June 30, 1964. I.J.C., Can. Sect. File E-8-6.

Using as an example the St. Lawrence and Great Lakes water levels, Dupuis describes the role played by the Commission in solving boundary water problems.

J.L. MacCallum, "The International Joint Commission and Its Work", Address to the Lambton Branch of the Association of Professional Engineers, Sarnia, Feb. 23. 1965. I.J.C., Can. Sect. File E-8-8.

Outlines the basic features of the Treaty and the Commission emphasizing the flexible nature in performing both judicial and investigative tasks.

M.W. Thompson, "Safeguarding the Quality of Boundary Waters", Speech to the Twelfth Industrial Waste Conference, Bigwin Inn, June 14, 1965. I.J.C., Can. Sect. File E-8-7.

Explains the increasing work of the Commission in relation to water pollution and the manner in which the Commission seeks to establish objectives of control with the assistance of Advisory Boards.

Charles R. Ross, "Statement on Boundary Water Pollution Abatement: United States and Canada", Statement to the Senate Subcommittee on Air and Water Pollution, Buffalo, June 17, 1965. I.J.C., Can. Sect. File E-8-10; U.S. Sect. File Speeches by IJC Personnel.

Outlines the efforts of the Commission to devise controls for pollution in the Great Lakes area and the cooperative arrangements which had been fostered between the Commission and local authorities.

Eugene Weber, Remarks at the Semi-Annual Meeting of the Great Lakes Commission, Duluth, July 22, 1965. I.J.C., U.S. Sect., File Speeches by IJC Personnel.

Discusses the work of the Commission in dealing with pollution control and water levels on the Great Lakes system.

D.M. Stephens, "Canada-United States International Water Problems", Address at Johns Hopkins University, Baltimore, 1965.

Discussing the basic nature of the Commission--noting that much of the success is attributable to the procedure which it has devised for handling problems with the paramount characteristics of flexibility. It must constantly be prepared to meet change.

> A basic requirement for any mechanisms designed to deal with international water problems between these two nations must be of course, that they are able to cope with these wide differences in the nature of the problems as they are encountered from region to region . . . . Our international water problems are also complicated by the changing nature of use and the changes in the relative importance of various uses that are encountered from region to region along these thousands of miles of common frontier.

A.D.P. Heeney, "Pollution in Boundary Waters", Address to the Canadian Institute on Pollution Control, 32nd Annual Meeting, Ottawa, Oct. 25, 1965. I.J.C. Can. Sect. File E-8-11.

Detailed description of the work of the Commission in the field of water pollution control, pointing out the constitutional limitations on the action which the Commission may take and noting that success must depend upon the securing of cooperation of all bodies concerned with the problem.

M.W. Thompson, "The Great Lakes and Their Problems", Address to the Conference on Water Resource Management and Conservation Council of Ontario, Toronto May 27, 1966. I.J.C. Can. Sect. File E-8-7.

Explains the current work of the Commission in seeking to alleviate the dual problems of water levels and pollution facing the Great Lakes.

J.L. MacCallum, "The International Joint Commission", 72 Canadian Geographical Journal 76-87 (March 1966).

A general article describing the nature of the Commission and the work in which it is presently engaged.

Matthew E. Welsh, Remarks before the Midwestern Governors' Conference, Cincinnati, June 22, 1966. I.J.C., U.S. Sect. Files.

Describing the role of the Commission in the total spectrum of water management, he lists five aspects of the Boundary Waters Treaty which facilitate the role.

First, it provides the basic legal instrument for the two countries to carry out a mutual resolve to manage wisely the waters of common concern.

Second, it enunciates a number of basic principles to insure consistency and equity in the use of waters of mutual concern.

Third, it establishes procedures to facilitate effective handling of common water management problems on a continuing basis.

Fourth, it provides the opportunity for management of international waters through the established institutions of each country rather than by separate procedures which could possibly duplicate or conflict with such institutions in either country.

Fifth, it provides a mechanism which can be used for resolution of other common problems, the most recent example being the control of air pollution in the boundary area between Detroit and Windsor.

J.L. MacCallum, "International Use of Canadian Water Supplies", Address to Sections of the American Bar Association, Montreal, Aug. 9, 1966. I.J.C., Can. Sect. File E-8-8.

Outlines the legal rules spelled out by the Boundary Waters Treaty governing the sharing of certain waters between Canada and the United States.

A.D.P. Heeney, "Diplomacy with a Difference--The International Joint Commission", INCO Magazine, Vol. 31, Number 3, Fall 1966.

Outlines the development of the Commission briefly emphasizing its creation as a substitute for usual diplomatic negotiations. Explains the philosophy of the treaty and the Commission as the "search for the common interest".

> . . . The Commissioners act, not as delegates striving for national advantage under instruction from their respective governments, but as members of a single body seeking solutions to common problems in the common interest.

D. Hearings before Committees

United States Congress, House Committee on Foreign Affairs, Hearings on the Diplomatic and Consular Appropriation Bill, Jan. 27-Feb. 3, 1913.

Statement by L.W. Busbey, Secretary, U.S. Section

United States Congress, House Committee on Foreign Affairs, Hearings on the Diplomatic and Consular Appropriation Bill, Jan. 30 & Feb. 4, 1913.

Statement by J.A. Tawney, Chairman, U.S. Section

United States Congress, House Committee on Foreign Affairs, Hearings on the Diplomatic and Consular Appropriation Bill, 63d Cong., 3d sess., Dec. 17-22, 1914.

Statements by J.A. Tawney and O. Gardner, Chairman

United States Congress, House Committee on Foreign Affairs, Hearings on the Diplomatic and Consular Appropriation Bill, Jan. 20, 1916.

Statement by J.A. Tawney

Canada, Parliament, Senate Committee on Banking and Commerce, Minutes of Proceedings and Evidence, 21st Parl., 6th Sess., June 25, 1952.

Witness: A.G.L. McNaughton

Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 21st Parl., 7th Sess., Mar. 17 & 19, 1953.

Witness: A.G.L. McNaughton

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Witness: A.G.L. McNaughton

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Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 23rd Parl., 1st Sess., December, 1957.

Witness: A.G.L. McNaughton

Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 24th Parl., 1st Sess., August, 1958.

Witness: A.G.L. McNaughton

Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 24th Parl., 2d Sess., April, 1959.

Witness A.G.L. McNaughton

Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 24th Parl., 3d Sess., March, 1960.

Witness: A.G.L. McNaughton

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Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, 26th Parl., 2d Sess., July 1964.

Witness: A.D.P. Heeney

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Canada, Parliament, House of Commons, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, June 1966.

Witness: A.D.P. Heeney

United States Congress, House of Representatives, Subcommittee of the Committee on Appropriations, Hearings, 86th Cong., 2d Sess., Feb. 1960, 1071-1079.

United States Congress, House of Representatives, Subcommittee of the Committee on Appropriations, Hearings, 86th Cong., 2d Sess., 1961, 1071-1081.

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United States Congress, House of Representatives, Subcommittee of the Committee on Appropriations, Hearings, 88th Cong., 1st Sess., 1964, 1353-1373.

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GOVERNMENT RECORDS

Canada, Department of External Affairs, Ottawa.
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International Joint Commission, United States Section, Washington.
Library Records.

BIOGRAPHICAL SKETCHES

ANDERSON, Chandler P. New York lawyer; special adviser to Elihu Root in the Department of State; chief United States negotiator of the Boundary Waters Treaty.

BRYCE, James (Lord Bryce) lawyer; British Ambassador to the United States during negotiation of the Boundary Waters Treaty; British signatory of the Treaty, January 11, 1909.

BURPEE, Lawrence J. Ottawa historian; appointed as first Secretary of the Canadian section of the International Joint Commission in 1912 where he remained until his death in 1946.

CLINTON, George P. Buffalo, New York lawyer; United States member of the International Waterways Commission; initial United States negotiator of the Boundary Waters Treaty in 1907.

GARDNER, Obadiah Maine farmer; former Democrat United States Senator from Maine; appointed a member of the United States section of the International Joint Commission by President Wilson in 1913; replaced Tawney as third Chairman of the United States section in 1914; resigned from the Commission on February 28, 1921; reappointed to the Commission by President Harding on March 23, 1921 and remained as Chairman of the United States section until his resignation in 1923.

GIBBONS, Sir George C. London, Ontario lawyer; Canadian Chairman of the International Waterways Commission; chief Canadian negotiator of the Boundary Waters Treaty; nominated as Chairman of the Canadian section of the International Joint Commission by Prime Minister Laurier in 1911.

GREY, Lord of Howick Governor General of Canada during the negotiation of the Boundary Waters Treaty.

HEARST, Sir William H. Toronto lawyer; former Conservative Premier of Ontario; appointed by Prime Minister Borden as a member of the Canadian section of the International Joint Commission in 1920 where he serveduntil his retirement in 1940.

MAGRATH, Charles A. Alberta engineer-surveyor; former Conservative Member of Parliament; appointed as a member of the Canadian section of the International Joint Commission by Prime Minister Borden in 1911; became second Chairman of the Canadian section of the Commission in 1914 and retired from that position in 1936.

McNAUGHTON, A.G.L. Saskatchewan engineer; General of the Army and former commander of the Canadian forces; former Cabinet Minister in King Government; appointed as a member of the Canadian section of the International Joint Commission by Prime Minister St. Laurent in 1950; became Chairman of the Canadian section of the Commission in 1950 and remained in that position until his retirement in 1962.

ROOT, Elihu New York lawyer; Secretary of State in the Theodore Roosevelt cabinet; elected as Republican United States Senator from New York in 1909; United States signatory of the Boundary Waters Treaty, January 11, 1909.

STANLEY, Augustus O. Kentucky lawyer; former Democrat United States Senator from Kentucky; appointed as a member of the United States section of the International Joint Commission by President Coolidge in 1930; became Chairman of the United States section of the Commission in 1933 where he remained until his resignation in 1954.

TAWNEY, James A. Minnesota lawyer; former Republican United States Representative from Minnesota; appointed a member of the United States section of the International Joint Commission by President Taft in 1911; became second Chairman of the United States section of the Commission in 1911; resigned as Chairman in 1914 but remained a member of the United States section until his death in 1919.

Present Commissioners (1967)

DUPUIS, René engineer; former member of the Quebec Hydro-Electric Commission; appointed as a member of the Canadian section of the International Joint Commission by Prime Minister Diefenbaker in 1962.

HEENEY, A.D.P. Montreal lawyer; senior public servant; former Canadian Ambassador to the United States; appointed a member of the Canadian section of the International Joint Commission by Prime Minister Diefenbaker in 1962; became Chairman of the Canadian section of the Commission in 1962.

ROSS, Charles R. lawyer; Commissioner of the Federal Power Commission; appointed as a member of the United States section of the International Joint Commission by President Kennedy in 1962.

STEPHENS, Donald M. engineer; Chairman of Manitoba Hydro; appointed as a member of the Canadian section of the International Joint Commission by Prime Minister Diefenbaker in 1958.

WEBER, Eugene W. engineer, former member of the United States Army Corps of Engineers; appointed as a member of the United States section of the International Joint Commission by President Truman in 1948.

WELSH, Matthew E. Indiana lawyer, former Democratic Governor of Indiana; appointed as a member of the United States section of the International Joint Commission by President Johnson in 1965; became Chairman of the United States section of the Commission in 1966.

I N D E X